South Carolina Procurement Review Panel

DECISIONS OF THE SOUTH CAROLINA PROCUREMENT REVIEW PANEL

1982-1988

Senator Hugh K. Leatherman, Sr.
Chairman

Edited by

Helen T. McFadden, Esq.
(1982-1984)

Faye A. Flowers, Esq.
(1985-1988)

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House Labor, Commerce & Industry Committee	Ron L. Cobb
Procurement Policy Committee	Nikki Setzler
Governor's Appointees	Harriette G. Shaw C. D. Sexton Robert T. Lyles Jeffrey Rosenblum Allard A. Allston, III

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1983

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1984

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1985

Budget and Control Board	Grady L. Patterson, Jr.
Senate Labor, Commerce & Industry Committee	Hugh K. Leatherman, Sr. (Chairman)
House Labor, Commerce & Industry Committee	Ron L. Cobb
Procurement Policy Committee	Nikki Setzler
Governor's Appointees	Harriette G. Shaw Jules J. Hesse Steve Bilton Jeffrey Rosenblum

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1986

Budget and Control Board	Grady L. Patterson, Jr.
Senate Labor, Commerce & Industry Committee	Hugh K. Leatherman, Sr. (Chairman)
House Labor, Commerce & Industry Committee	Luther L. Taylor, Jr.
Procurement Policy Committee	Nikki Setzler
Governor's Appointees	Harriette G. Shaw Jules J. Hesse Steve Bilton Jeffrey Rosenblum

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1987

Budget and Control Board	Grady L. Patterson, Jr.
Senate Labor, Commerce & Industry Committee	Hugh K. Leatherman, Sr. (Chairman)
House Labor, Commerce & Industry Committee	Luther L. Taylor, Jr.
Procurement Policy Committee	Nikki Setzler
Governor's Appointees	Jules J. Hesse Roy E. Moss (Gen. Ret.) Carol Baughman Gus J. Roberts Kiffen R. Nanney

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South Carolina Procurement Review Panel

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SEN. HUGH K. LEATHERMAN
CHAIRMAN

March 1989

P R E F A C E

This publication of the decisions of the South Carolina Procurement Review Panel presents the work of the Panel from its inception in 1982 through 1988. Also included from the same time period are Circuit Court, Court of Appeals and Supreme Court decisions involving the Panel.

The Panel was created by Act 148 of 1981 (codified as S. C. Code Ann. §§ 11-35-10, et seq., (1976)) and given the responsibility of providing "administrative review of formal protests of decisions arising from the solicitation and award of contracts, the debarment or suspension of a person from consideration of award of a contract, a decision concerning the resolution of a breach of contract controversy, or any other decision, policy or procedure arising from or concerning the expenditure of state funds for the procurement of any supplies, services, or construction . . . ." The decisions collected herein are the final results of the Panel's review procedure.

I take this opportunity to praise the hard work and dedication of the staff of the Division of General Services, which is charged with the difficult job of implementing the policies and procedures of the Procurement Code. Because they do an excellent job of achieving the goals of fair treatment of bidders and best price for the State, the Panel has heard relatively few protests. (See Exhibit 1).

Over the course of its seven year existence, the Panel has been ably served by the staffs of the Attorney General's Office and the Clerk of the Senate. The staff of the Office of the Attorney General was crucial to the implementation of the review process. A number of attorneys from that office have served as counsel to the Panel: Judy Finuf, Ken Woodington, David Eckstrom, and Ed Salter.

From 1985 to 1987, the office of the Clerk of the Senate provided invaluable administrative and legal support to the Panel. I thank all those from that office who kept the Panel

functioning during that time: Frank Caggiano, Clerk of the Senate; Brenda Otto, Administrative Assistant to the Clerk; and Hogan Brown, Helen McFadden, and Bob Merritt, who served as counsel to the Panel.

On July 1, 1987, the Procurement Review Panel became an agency of the State in its own right. I thank the staff who currently serve the Panel for preparing this publication and for all their other assistance: Susan Wessinger, Administrative Assistant to the Panel and Faye Flowers, attorney for the Panel. I would also like to thank the former Administrative Assistant to the Panel, Robert E. Dawkins, for all his help.

Finally, I must commend the members of the Panel, past and present, who are the final ingredient in the success of the review process envisioned by the Procurement Code. Members of the Panel, who review voluminous records in order to attend hearings fully prepared on the facts and issues, exhibit true public service. Their study and interest produces decisions which further the goals of the Code and ultimately benefit the people of South Carolina.

Hugh K. Leatherman, Sr.
Chairman, Procurement Review Panel

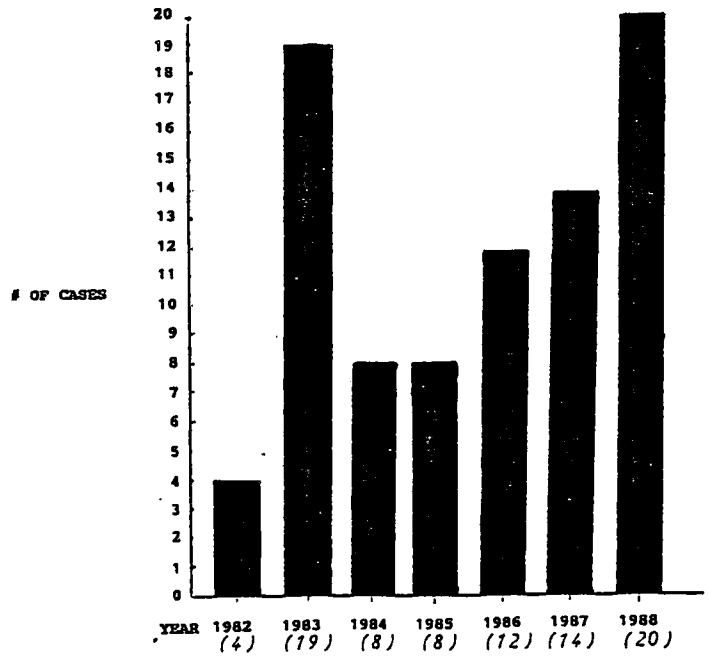

Exhibit 1

Total number of cases filed with the Panel by year.

TABLE OF CASES

CASES FILED WITH THE SOUTH CAROLINA PROCUREMENT REVIEW PANEL
(Alphabetically, by Protestant)

* No written disposition located

* No written disposition located

* No written disposition located

* No written disposition located

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1985-6	Darby Marine & Supply, Inc. (Withdrawn)
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1986-1	Kahn-Lockwood, Inc.
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1986-12	General Sales Co., Inc.

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1987-1	Palmetto Computer Services, Inc.
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1987-7	Chi Corporation
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1987-9	M. L. Clapp Construction Company
1987-10	Pee Dee Regional Transportation Authority (Withdrawn)
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1988-1	Xerox Corporation
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1988-3	Zupan & Smith Sand and Concrete Company
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1988-5	CNC Company
1988-6	Homer L. Spires, Masonry Contractor
1988-7	Davis-Garvin Agency, Inc.
1988-8	Tryco, Inc.
1988-9	Davis-Garvin Agency, Inc. II
1988-10	Sun Environmental, Inc. (Withdrawn)

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1988-11	Conway Child Development Center
1988-12	Polaroid Corporation
1988-13	Oakland Janitorial Service
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DECISIONS OF THE

SOUTH CAROLINA

PROCUREMENT REVIEW PANEL

STATE OF SOUTH CAROLINA)	BEFORE THE SOUTH CAROLINA
)	PROCUREMENT REVIEW PANEL
COUNTY OF RICHLAND)	CASE NO. 1982-1
IN RE:)	
PROTEST OF DURR-FILLAUER)	
MEDICAL, INC.)	O R D E R

This matter is before the South Carolina Procurement Review Panel as a result of a bid protest and appeal involving a contract awarded to Southeastern Hospital Supply Company on or about April 30, 1982, involving the furnishing of certain medical supplies to the South Carolina Department of Mental Health. A bid protest as filed in this matter on or about May 7, 198, by Durr-Fillauer Medical, Inc. on the ground that, although Southeastern Hospital Supply Company certified that it was a resident vendor under §11-35-1520(9)(d) of the 1976 Code of Laws of South Carolina (as amended), it did not maintain a representative inventory of commodities on which the bid was submitted in the State of South Carolina, as was required for resident vendor status under the Code section. The medical supplies at issue involve Item 27 (800 cases: cups, medicine, one ounce, polypropelene) and Item 58 (56 cases: Telfa dressings, 4 by 3 sterile, 1050 Curity) of the contract.

An administrative hearing was conducted by the Honorable Tony R. Ellis, Materials Management Officer, on May 28, 1982. In attendance at this hearing were representatives of Durr-Fillauer Medical, Inc., Southeastern Hospital Supply Corporation, and the South Carolina Department of Mental Health. Following that hearing, a

decision was rendered by the Materials Management Officer on June 2, 1982, which determined that Southeastern Hospital Supply Corporation should not receive consideration as a resident vendor in regards to Items 27 and 58 of the contract because of its failure to maintain the necessary representative inventory for such items within the State of South Carolina. The Order further required that the South Carolina Department of Mental Health award contracts for Items 27 and 58 as outlined in its Bid Notice of March 23, 1982, to the lowest responsive and responsible bidder.

The matter came before this Panel by way of an appeal by Southeastern Hospital Supply Corporation of the decision of the Materials Management Officer. This appeal, dated June 10, 1982, asserted that the Materials Management Officer had erred in denying Southeastern Hospital Supply Corporation resident vendor status under § 11-35-1520(9)(d) of the Code of Laws of South Carolina (1976) in that Southeastern Hospital Supply Corporation in fact maintained a representative inventory of commodities within the State of South Carolina. The appeal further alleged that Southeastern Hospital Supply Corporation maintained a representative inventory of the specific commodities as to the particular bid and that the corporation had fully complied with all the requirements of the Code for qualification as an instate vendor.

A hearing was held by the South Carolina Procurement Review Panel on June 22, 1982. In addition to the Panel

members present for this hearing, the South Carolina Department of Mental Health was represented, as was Southeastern Hospital Supply Corporation and Durr-Fillauer Medical, Inc. At the hearing, arguments were heard by all parties in support of their positions. In reaching its decision, the Panel has considered not only those arguments, but also the evidence which was presented to the Materials Management Officer, as well as a letter dated June 28, 1982, by James D. Cooper, Jr., Esquire, Attorney for Southeastern Hospital Supply Corporation, which letter enclosed an Affidavit by Wilbur S. Matthews, an employee and agent of Southeastern Hospital Supply Corporation. As a result of the aforesaid evidence and arguments presented to and considered by this Panel, we are of the opinion that there is little dispute as to the critical facts in this case, and we have determined that the decision of the Materials Management Officer, dated June 2, 1982, should be affirmed.

In reaching our decision in this case, we have considered and concur with the Materials Management Officer's interpretation of the requirements to achieve instate vendor status under § 11-35-1520(9)(d) of the South Carolina Code of Laws (1976). We, therefore, expressly affirm and adopt the following section of the decision of the Materials Management Officer dated June 2, 1982:

> A resident vendor must be a person or organization engaged in the business of selling tangible personal property or services to the

State who is in good standing under the laws of the State of South Carolina and who:

1. If selling tangible personal property:
   (a) Is a resident of the State or a foreign corporation authorized to transact business in the State; and
   (b) Maintains an office in the State; and
   (c) Has a stock of materials held in South Carolina for sale in the ordinary course of business, which stock is of the general type offered, and which is reasonably sufficient in quantity to meet the ordinary requirements of customers; and
   (d) Has paid personal property taxes pursuant to Title 12, Chapter 27, Article 1, et seq., of the Code of Laws of South Carolina, 1976, as amended, on equipment used in the regular course of supplying services of the general type offered; and
   (e) Has paid business and occupational taxes pursuant to Title 12, Chapters 19, 21, 23, and 35, as applicable, of the Code of Laws of South Carolina, 1976, as amended.

2. If selling services:
   (a) Is a resident of the State or is a foreign corporation authorized to transact business in the State; and
   (b) Maintains an office in the State; and
   (c) Has paid personal property taxes pursuant to Title 12, Chapter 37, Article 1, et seq., of the Code of Laws of South Carolina, 1976, as amended, on equipment used in the regular course of supplying services of the general type offered; and
   (d) Has paid business and occupational taxes pursuant to Title 12, Chapters 19, 21, 23, and 35, as applicable, of the Code of Laws of South Carolina, 1976, as amended.

A vendor if expressly prohibited from claiming the in-state vendor preference on bids for items not normally stocked or handled by the company, or if the vendor's stock is comprised of samples only and is not sufficient to fill the day-to-day orders of customers.

Based on the evidence presented to us, we hereby make the following findings of fact:

1. Southeastern Hospital Supply Corporation was incorporated in the State of North Carolina and first registered to do business in the State of South Carolina on March 16, 1982.

2. Southeastern Hospital Supply Corporation was engaged in the business of supplying medical supplies to various medical institutions in South Carolina, including hospitals, State agencies, etc.

3. Southeastern Hospital Supply Corporation maintains storage facilities in North Carolina, Virginia, and Columbia, South Carolina. The warehouse in North Carolina contains 180,000 square feet of space.

4. The one office and storage facility in South Carolina is located at 4508 St. Andrews Road. This facility is shared with eighteen (18) other businesses. Furthermore, this facility is 400 square feet in size.

5. Item 27 of the bid protest involves polypropelene cups. Orders for these cups are required to be filled in between five (5) and seven (7) days.

6. Since Item 27 was awarded to Southeastern Hospital Supply Corporation, an order was placed with them on May 4, 1982, for two hundred (200) cases. One hundred (100) cases were received by the South Carolina Department of Mental Health on May 17, 1982, seventy (70) cases were received by the South Carolina Department of Mental Health on May 21,

1982, and thirty (30) cases were received by the South Carolina Department of Mental Health on June 2, 1982.

7. Southeastern Hospital Supply Corporation keeps between one (1%) and two (2%) percent of the amount ordered by the agency of group awarding the contract. In the case of Item 27, polypropelene cups, two hundred (200) cases of the cups are ordered at a time. However, only two (2) cases of the cups are maintained by Southeastern Hosptial Supply Corporation at its Columbia, South Carolina, storage facility.

8. Southeastern Hospital Supply Corporation considers the North Carolina warehouse as its primary source to fill South Carolina contracts, with the South Carolina storage facility serving only as an emergency or "back-up" facility.

9. The total inventory maintained by Southeastern Hospital Supply Corporation in South Carolina at any given time is between $2,000.00 and $5,000.00

10. As of the date of the hearing, no South Carolina taxes had been paid on any inventory in South Carolina by Southeastern Hospital Supply Corporation.

11. In contrast to the foregoing, Durr-Fillauer Medical, Inc. maintains an inventory of approximately $1,483,000.00 in medical supplies, said inventory being taken on December 1, 1981, and being located within an approximately 40,000 square foot warehouse located at 2413 Leaphart Road, West Columbia, South Carolina.

The foregoing facts lead us to the conclusion that Southeastern Hospital Supply Corporation does not maintain a representative inventory of commodities on which its bid was submitted and it has not paid all taxes duly assessed, as required by § 11-35-1520(9)(d) of the Code of Laws of South Carolina (1976). Although the exact date on which Southeastern Hospital Supply Corporation began doing business in South Carolina is unclear, it is apparent that this date precedes by a considerable amount the date on which it was formally authorized by the Secretary of State's office to transact business in this State. Therefore, athough no taxes have been apparently assessed as of today's date, it appears that this is in part due to the failure by Southeastern to register with the Secretary of State's office.

Of greater importance, however, is the failure of Southeastern to maintain a representative inventory of commodities in this State. It is obvious to us that the small storage facility utilized by Southeastern on St. Andrews Road is not sufficient to provide inventory for this contract, as well as for other contracts in this State. Southeastern has admitted that it only maintains between one (1%) and two (2%) percent of the amount of the contract to be ordered at any given time. Furthermore, they have admitted that the South Carolina inventory is only used for emergency or back up situations.

The whole purpose behind the section of the Procurement Code at issue is to provide a bidding advantage for South Carolina vendors in certain situations. In this case, it appears that bidding advantage would have made a difference insofar as Item 27 is concerned. Furthermore, although it would have made no difference insofar as Item 58 was concerned, nevertheless the certification filed by Southeastern as to its qualifications for resident vendor status was false and misleading. Based on the foregoing, it is clear that Southeastern did not maintain a representative inventory of commodities as required by the Code for Items 27 and 58 and that, therefore, Southeastern was not entitled to resident vendor status at the time the bid was submitted.

We, therefore, make the following conclusions of law:

1. Southeastern Hospital Supply Corporation filed a false and misleading certificate concerning its status as a resident vendor under §11-35-1520(9)(d) of the 1976 Code of Laws of South Carolina (as amended);

2. The certification at issue was false and misleading in that at the time it was given, Southeastern Hospital Supply Corporation did not maintain a representative inventory of commodities on which the bid was submitted in the State of South Carolina, as required under §11-35-1520(9)(d) of the Code;

3. Due to the fact that a false and misleading certificate was filed by Southeastern Hospital Supply Corporation, the bid of Southeastern Hospital Supply

Corporation should be rejected, the contract for Items 27 and 58 rescinded, and the remaining portion of the contract awarded by the South Carolina Department of Mental Health to the lowest responsive and responsible bidder, other than Southeastern Hospital Supply Corporation.

IT IS, THEREFORE, ORDERED that the bid submitted by Southeastern Hospital Supply Corporation to the South Carolina Department of Mental Health for medical supplies be rejected.

IT IS FURTHER ORDERED that the contract which was awarded to Southeastern Hospital Supply Corporation by the South Carolina Department of Mental Health for medical supplies be rescinded as of today's date.

IT IS FURTHER ORDERED that the remaining portion of that contract from the South Carolina Department of Mental Health be awarded to the lowest responsive and responsible bidder, other than the Southeastern Hospital Supply Corporation.

AND IT IS SO ORDERED.

FOR THE SOUTH CAROLINA
PROCUREMENT REVIEW PANEL

By: /s/ Hugh K. Leatherman
Hugh K. Leatherman, Sr.
Chairman

August 10, 1982
Columbia, S.C.

STATE OF SOUTH CAROLINA	)	BEFORE THE DULY APPOINTED
	)	HEARING OFFICER
COUNTY OF RICHLAND	)	CASE NO. 1982-2
IN RE:	)	
	)	
PROTEST OF AIR CONDITIONING CONSULTING AND SERVICING, INC.	)	RECOMMENDATION
	)	

This matter is before me, pursuant to my appointment as Hearing Officer by the Chairman of the South Carolina Procurement Review Panel under the Provisions of Act 538 of 1982, on the Request for Review of the Decision of the Materials Management Officer issued July 2, 1982. The Decision being reviewed is from a Bid Protest filed on June 3, 1982, based on a contract award by the Department of General Services to Suggs Sales and Service, Inc. A hearing was held on that protest in the office of the Materials Management Officer on June 25, 1982. The Decision being reviewed upheld the contract award and found the Protest of Air Conditioning Consulting and Servicing, Inc. to be without merit. A hearing before me was held on September 24, 1982, at which time Air Conditioning Consulting and Servicing, Inc. appeared, represented by counsel. The Department of General Services appeared, together with the University of South Carolina with their counsel, and Suggs Sales and Service, Inc., the contract recipient, was interviewed.

FINDINGS OF FACT

Pursuant to the requirements of Section 11-35-1520, South Carolina Code of Laws (1976), as amended, the Division of General Services for the State of South Carolina mailed out an "Invitation for Bids" for preventative maintenance inspection service on six (6)

chiller units at the University of South Carolina for the years 1982 and 1983. Service was to include one (1) "during operation" inspection and one (1) "shutdown" inspection for each unit. Bids were received on April 19, 1982, and evaluated pursuant to Section 11-35-1520(7) and Consolidated Procurement Code Regulation 19-445.2070 of the 1976 Code, as amended.

The Bid of Air Conditioning Consulting and Servicing, Inc. was found to contain two (2) notations on its bid response. The first notation was found to be inconsequential under General Service's Evaluation. The second notation, however, stated that on Unit Four (4), the bid "does not include anything on turbine". This notation was found by General Services to be a modification of the bid requirements requiring rejection of the Bid. The maintenance and servicing contract was subsequently awarded to Suggs Sales and Service, Inc.

Counsel for Air Conditioning Consulting and Servicing, Inc. alleged during the hearing before me that the bid of Air Conditioning Consulting and Servicing, Inc. should not have been rejected on the grounds that the Bid Invitation did not reflect that maintenance and service on the turbine was to be performed. The additional argument was made that the Bid Invitation was ambiguous in that the turbine was merely an associated piece of equipment and not an integral component part of the Number Four (4) chiller unit.

During the hearing, the President of Air Conditioning Consulting and Servicing, Inc. stated his familiarity with the equipment listed in the Bid Invitation and stated that he intended to inspect

the electric motors on the other units at least to some extent. The turbine in issue is the energy source for Unit Four (4) and that unit is incapable of operation without the use of the turbine. The Bid Invitation solicited maintenance inspection services including one (1) "during operation" inspection and one (1) "while shutdown" inspection of each unit. The Unit Four (4) chiller requires the use of the turbine for operation in order to be inspected "during operation"

I find that there is substantial evidence on the whole record showing that a turbine is an integral part of the chiller in issue and that the combination of chiller and turbine comprise the unit listed for inspection service. I further find that under industry custom an inspection of the unit would include inspection of both turbine and chiller and that, therefore, the Bid Invitation was not ambiguous. If it was not customary, the Protestant would not have thought it necessary to state that the turbine was not included.

CONCLUSIONS OF LAW

1. The Hearing Officer accordingly finds that the Protestant failed to conform to the essential requirements of the Invitation for Bids issued March 29, 1982, for preventative maintenance inspection service on six (6) chillers at the University of South Carolina for the years 1982 and 1983, thereby requiring rejection of the Protestant's Bid pursuant to Regulation 19-445.2070, Subsection A, of the Consolidate Procurement Code Regulations.

2. The Hearing Officer accordingly finds that the modification of the Protestant's Bid to the effect that the Bid "did not include anything on turbine" was such a modification as to require

rejection of the Protestant's Bid pursuant to Regulation 19-445.2070, Subsection D, of the Consolidated Procurement Code Regulations.

3. The Hearing Officer further finds that the modification of the Bid by the Protestant went to the substance of the Bid further requiring rejection.

THEREFORE, IT IS THE RECOMMENDATION OF THE HEARING OFFICER THAT:

1. The Protest of Air Conditioning Consulting and Servicing, Inc. be dismissed.

2. The Award of the contract to Suggs Sales and Service, Inc. be upheld.

IT IS SO RECOMMENDED.

FOR THE PROCUREMENT REVIEW PANEL

BY: _____
Hearing Officer

October 1, 1982.

ADOPTED BY THE PANEL 10-19-82

STATE OF SOUTH CAROLINA	)	BEFORE THE SOUTH CAROLINA
	)	PROCUREMENT REVIEW PANEL
COUNTY OF RICHLAND	)	CASE NO. 1982-3
IN RE:	)	
	)	
PROTEST BY DATA-TEC BUSINESS FORMS	)	O R D E R
	)	

This matter is before the South Carolina Procurement Review Panel as a result of a controversy arising under and by virtue of a contract between Data-Tec Business Forms and the South Carolina Department of Highways and Public Transportation.

Following a Request for Bids by the South Carolina Department of Highways and Public Transportation, Bid No. 09563, for 100,000 multi-copy Oversize or Overweight Trip Permits, a quotation was submitted by Data-Tec Business Forms in the amount of $1,914.00. A Purchase Order, No. 12036, was issued by the South Carolina Department of Highways and Public Transportation and the contract awarded to Data-Tec on June 28, 1982. By letter dated September 10, 1982, the forms were rejected as delivered due to reduced type size. By letter dated September 29, 1982, a written request for a hearing was made by Data-Tec to the Materials Management Office. A hearing was held before the Acting Materials Management Officer on October 19, 1982, to consider the South Carolina Department of Highways and Public Transportation's refusal to accept the forms supplied by Data-Tec. In attendance at the hearing were representatives of the Materials Management Office, the South Carolina Department of Highways and Public Transportation, and Data-Tec. Following the hearing, a Decision was rendered on or about October 25, 1982, finding that the South Carolina Department of

Highways and Public Transportation had not breached its contract with Data-Tec by refusing to accept the forms as delivered on the ground that Data-Tec had not complied with the requirements of the Bid Solicitation and Purchase Order. A Request for Review before the Review Panel was subsequently filed and a hearing was held on December 7, 1982. Testimony was taken and evidence was received from representatives of Data-Tec and the South Carolina Department of Highways and Public Transportation. Both parties were represented by counsel.

FINDINGS OF FACT

The Bid Documents and Purchase Order in this case call for 100,000 multi-copy Oversize or Overweight Trip Permits. The quotation notes that a "photo copy" of the form required was attached and that, before printing, the bidder must contact Mr. D. R. Cherry of the Oversize Permit Office "to determine proper wording and spacing, submit a finished set with carbons for proofreading, trial on typewriter, and checking quality of carbon copies". The Purchase Order contains the identical requirement.

The testimony on the record establishes that Mr. Gerald Sease, a representative of Data-Tec, following conversations and after meeting with Mr. Cherry, came to the offices of Mr. Cherry, who was on vacation, and submitted a form for "proofing" to Mrs. Nancy Temple, Mr. Cherry's Secretary who was in charge of the office during Mr. Cherry's absence. Mrs. Temple signed the proof, although it was stated that Mrs. Temple did comment that she felt the print on the proof was too small. Data-Tec was not contacted by the South Carolina

Department of Highways and Public Transportation until several weeks later and, at that time, the forms had already been printed and shipped. The Panel, based on the evidence and testimony in the record, finds that the proof signed by a representative of the South Carolina Department of Highways and Public Transportation without notation or restriction waived the requirement for a submission of a finished set of forms prior to printing, and that the Department may not now refuse to accept delivery of those forms based on reduced type size and a failure to satisfy contract specifications.

CONCLUSIONS OF LAW

1. The Panel finds that the South Carolina Department of Highways and Public Transportation, in its contract specifications, required that, prior to printing, the Contractor contact the Department for a determination of proper wording and spacing, submission of a finished set of carbons for proofreading, for trial on the typewriter, and for consideration of the quality of carbon copies.

2. The Panel further finds that the signature of an employee of the Department of Highways and Public Transportation, with apparent authority to act for the Department, on the "proof" form without any notation or restriction as to type size or submission of a finished set with carbons was a waiver of those requirements in the contract specifications.

3. The Panel further finds that the contractor relied on the signature and "proof" in proceeding to print the forms in issue based on industry custom.

4. The Panel further finds that the South Carolina Department of Highways and Public Transportation may not now refuse to accept delivery of the forms in issue due to reduced type size and a failure to satisfy contract specifications.

5. The Panel further finds that the South Carolina Department of Highways and Public Transportation may not refuse to process payment to Data-Tec Business Forms for the amount stated in the contract due to reduced type size and a failure to satisfy contract specifications.

IT IS THEREFORE ORDERED that the South Carolina Department of Highways and Public Transportation shall pay to Data-Tec the full amount of the contract price as stated on Purchase Order No. 12036, which is $1,914.00.

IT IS SO ORDERED.

THE SOUTH CAROLINA PROCUREMENT REVIEW PANEL

Senator Hugh K. Leatherman
Chairman

December 13th, 1982.

STATE OF SOUTH CAROLINA)) COUNTY OF RICHLAND)	IN THE COURT OF COMMON PLEAS 83-CP-40-0191
IN THE MATTER OF)) Data-Tec Business Forms,) Respondent, (Respondent))) -vs-)) South Carolina Department of) Highways and Public Transpor-) tation,) Petitioner. (Appellant))	ORDER REVERSING S.C. PROCUREMENT REVIEW PANEL

This is an appeal from the South Carolina Procurement Review Panel, hereinafter referred to as the Review Panel, which Panel is established by S.C. Code Ann. Section 11-35-4410 (1983 Cum. Supp.). It is noted from the outset that the Review Panel itself sat as an appellate panel in this matter in review of a decision by Richard J. Campbell, Acting Materials Manager Officer, who rendered a decision on October 25, 1982. The jurisdiction of the Review Panel, it is this court's conclusion, is not only appellate in nature but also de novo. See S.C. Code Ann. Section 11-34-4410 (5) (1983 Cum. Supp.) This review of the Circuit Court, therefore, is from a final decision of the Procurement Review Panel in a contested case and is therefore pursuant to S.C. Code Ann. Section 1-23-380 (1983 Cum. Supp.)

Arguments came on to be heard in the Circuit Court before the undersigned sitting as Special Judge. Data Tec Business Forms (hereinafter referred to as Data Tec) is represented by John Medlin and South Carolina Department of Highways and Public transportation (hereinafter referred to as Highway Department) is represented by Assistant Chief Counsel to Petitioner, William L. Todd.

The scope of review in this case is clear. This Court"...shall not substitute its judgment for that of the agency as to weight of the evidence on questions of facts." S.C. Code Ann. Section 1-23-380 (g) (1983 Cum. Supp.). Nor may this Court substitute its judgment for that of the lower administrative tribunal "...upon a question as to which there is room for a difference of intelligent opinion..." Patton v. The South Carolina Public Service Commission, Sup. Ct. of S.C., Opinion Number 22033, filed January 19, 1984; Chemical Leaman Tank Lines, Inc. v. S.C. Public Service Commission, 258 S.C. 518, 189 S.E.2d 298 (1972).

Applying the well accepted "substantial evidence" standard for judicial review of administrative agency decisions, the S.C. Supreme Court has stated:

> 'Substantial evidence' is not a mere scintilla of evidence nor evidence viewed blindly from one side of the case, but is evidence which, considering the

> record as a whole, will allow reasonable minds to reach the conclusion that the administrative agency reached or must have reached in order to justify its action.

Lark v. Bi-Lo, Inc., 276, S.C. 130, 276 SE 2d 304, 306 (1981).

'Substantial evidence' is something less than the weight of the evidence, and the possibility of drawing two inconsistent conclusions from the evidence does not prevent an administrative agency's finding from being supported by substantial evidence. Ellis v. Spartan Mills, 276 S.C. 216, S.E.2d 590 (1981), and a judgment upon which reasonable men might differ will not be set aside. Lark v. Bi-Lo, Inc., 276 S.E.2d at 307..

I. The Jurisdictional Issue

At the conclusion of oral argument in this case, counsel for the Highway Department mentioned that he believed there was a jurisdictional problem in this case and requested leave of Court to submit a brief thereon. The Court granted this request and both parties have submitted Memoranda on the alleged jurisdictional question.

The Memorandum of the Highway Department argues that this court is without jurisdiction because the Review Panel was without jurisdiction inasmuch as Data-Tec did not timely file an appeal from the decision of the Acting Materials Management Officer, Richard J. Campbell, to the Review Panel. In support of this argument, the Memorandum of Law of the Highway Department attaches four (4) "Exhibits", to wit:

> Exhibit #1. A letter dated October 25, 1982 from Richard J. Campbell, Acting Materials Management Officer, to Mr. B. Gerald Sease, Data-Tec Business Forms, which letter purported to enclose a copy of Mr. Campbell's decision in the case and advised that"...if you do not agree with my decision, you have the right to notify me in writing within ten (10) days from the receipt of this decision and request an appearance before the Procurement Review Panel..."
>
> Exhibit #2. A letter under the signature B.G. Sease, on the letterhead of Data-Tec Business Forms, to Mr. Richard J. Campbell, S.C. Budget and Control Board, which advises that "...after reviewing your decision, I request an appearance before the Procurement Review Panel." This letter is dated November 8, 1982 and is stamped "Received November 10, 1982, Material MGMT. Office State Procurement"
>
> Exhibit #3. A letter dated November 12, 1982 under the signature of Richard J. Campbell, Acting Materials Management Officer to Mrs. Judith A. Finuf, Attorney General's Office, which ways, inter-alia, that

"...this appeal has been made within the ten (10) day time period..." It also requests Mrs. Finuf to review the matter and advise Senator Hugh K. Leatherman, Chairman of the Procurement Review Panel, of the Appeal.
Exhibit #4. An order of the Honorable Owens T. Cobb, Jr., dated May 4, 1983, in the case of S.C. Alcoholic Beverage Control Commissioner v. J. K. Surles, 83-CP-40-4011

These "Exhibits" do not appear in the record of this case as transmitted from the lower tribunal.

The State first argues that the Court lacks jurisdiction because more than ten (10) days elapsed between the date of the decision of the Acting Materials Management and the request of Data-Tec for the review and secondly, that the request was not received by Mr. Campbell's Office until seventeen (17) days after the decision. Although, the Highway Department cites and extensively argues from the unpublished opinion of Judge Cobb which dealt with a misdirected notice of appeal, this Court does not interpret an argument of the Highway Department to be that this case is jurisdictionally defective because the November 8, 1982, letter of Mr. Sease was directed to Richard J. Campbell, rather than specifically to the S.C. Procurement Review Panel. It is also to be noted that, although, the Highway Department argues that the appeal time between the Acting Materials Management Officer and the Review Panel is ten (10) days and not thirty (30) days as established by S.C. Code Ann. Section 1-23-380 (1983 Cum. Supp.) Data-Tec does not argue for a thirty (30) days standard, and it would therefore be unnecessary to consider this question in any event.

Data-Tec advances the proposition that the State is precluded by estoppel from raising a jurisdictional issue at this time during the proceedings.

The essential elements of equitable estoppel as related to the party estopped are: (1) conduct which amounts to false representation or concealment of material facts, or, at least, which is calculated to convey impression that facts are otherwise than, and inconsistent with, those which party subsequently attempts to assert; (2) intention, or at least expectation, that such conduct be acted upon by other party; and (3) knowledge, actual or constructive, of real facts; essential elements of equitable estoppel as related to party claiming estoppel are: (1) lack of knowledge and of means of knowledge of truth as to facts in question; (2) reliance upon conduct of party estopped; and (3) action based thereon of such a character as to change his position prejudicially. Frady v. Smith, 247 S.C. 353, 147 S.E.2d 412,415 (1966).

The conduct of the Highway Department in this appeal does not come within the definition of estoppel and the appellant is therefore not estopped from asserting a jurisdictional issue at this stage of the proceedings.

Moreover, the cases in our jurisdiction hold that the matter of jurisdiction can be raised at any time during the proceedings Bramlett v. Young, 229 S.C. 519, 93 S.E.2d 873 (1956), even by the Court ex mero motu. Betterson v. Stewart, 238 S.C. 574, 121 S.E.2d 102, 105 (1961). The jurisdictional issue however may be raised only once and after an adverse ruling, the matter is res judicata if the adverse ruling is not appealed. Hoffman-Hoffman v. S. & K. Systems and Just E. Cooper, S.C. Ct. App. Opinion No. 0151, April 13, 1984.

The State is thus not precluded from raising the jurisdictional issue for the first time during argument before the Circuit Court on an appeal.

Petitioner urges that a review of the "exhibits" in his Memorandum of Law leads to the conclusion that the appeal of Data-Tec from the decision of the Acting Materials Management Officer to the Review Panel was not timely, and therefore, that the Review Panel had no jurisdiction in this matter.

It is generally said that the statutory procedures for seeking administrative review are mandatory.

> The procedure for taking an appeal to an appellate Administrative tribunal from the determination of an Administrative body generally depends on the statutory provisions; and statutory requirements must be complied with. A party seeking to appeal must file a notice of appeal within the time prescribed by statute....

73 C.J.S. Public Administrative Bodies and Procedures, §159, at 497, 498.

> The right of appeal to a reviewing administrative agency is purely statutory and all applicable statutory requirements must be complied with to sustain such appeal.

1 Am. Jur. 2d Administrative Law §543 at 353.

> The time for taking an administrative appeal is generally prescribed by statute or regulation and timely application has been held necessary, delay beyond the statutory time being fatal.

Id. §544 at 354.

In addition, the majority of the courts which have considered a litigant's failure to timely perfect an appeal to an administrative forum have concluded that the appellate forum lacks jurisdiction to consider the appeal. For example, the Ohio Supreme Court in Lee Jewelry Co. v. Bowers, 124 N.E.2d 415 (1955) noted that "compliance

with the specific mandatory provisions of statutes governing the filing of notice of appeal to the Board of Tax Appeals...is essential to confer jurisdiction on the Board." The Arizona Supreme Court in Campbell v. Chatwin, 428 P.2d 108 (1967) similarly recognized the jurisdictional restraint in a case involving a highway department review proceeding:

> Obviously the request for a hearing must be made prior to the running of the ten (10) day period of notice prior to the effective date. Therefore, the failure to make a timely request for the administrative hearing on the suspension order waived for plaintiffs the right to any administrative review. Id. at 113.

In Campbell, the Court further noted that the time limit for filing the appeal was "jurisdictional".

The Georgia Appellate Court in Miller v. Georgia Real Estate Comm., 136 Ga. App. 718, 222 S.E.2d 183, (1975) held that "when an appeal of an adverse decision by an administrative agency is filed beyond the time allowed by law, the Superior Court has no jurisdiction to take any action other than to dismiss the case."

The South Carolina Supreme Court in an analogous situation appears to be in accord. Pursuant to the South Carolina Worker's Compensation Act, administrative review may be had when the decision of the single Commissioner is appealed to the Full Commission. This State's decisions dealing with the procedure suggest that it is mandatory to strictly and accurately follow the appellate procedures to vest the full Commission with authority to review, administratively, the decision of the single Commissioner. See, e.g. Wall v. C.Y. Thomason Co., 232 S.C. 153, 101 S.E. 2d 286 (1957). Burnett v. S.C. State Highway Dept., 252 S.C. 579, 167 S.E. 2d 572 (1969) held that the Court had no discretion or authority to extend the statutorily mandated time for taking an appeal because if the notice of appeal is not timely, the Court has no jurisdiction.

The above authority makes it clear that strict compliance with procedural requirements is mandated on appeals. The record in this case however, may be distinguished from that in the Surles case cited by the State. The Order of Judge Cobb in that case stated at page 2 that "...the record as certified to this Court by the S.C. State Employee Grievance Committee evinces without doubt that Mr. Surles failed to file his request for appeal within ten (10) days of the Commission's final decision as required in Section 8-17-40 of the code..." (emphasis added) In the instant case, the record on appeal does not contain the time frames in question. Accepting the premise that a party may assert the jurisdictional issue for the first time on appeal and further accepting the premise that the statutes setting the requirements for the appeal must be strictly followed, the record in this case is absolutely devoid of the facts as to the time limits in question. There is simply no record for the Court to determine this issue without a stipulation of the

parties or an evidentiary hearing. The attachments to the Memorandum of the Highway Department are not a part of the record certified to this Court. It should also be noted at this juncture that even if one were to accept the "exhibits" presented by the State's attorney in its Memorandum, one important fact is omitted, and that is the date Mr. Sease received actual notice of the decision of the Acting Materials Management Officer. Were the issue of timeliness of the appeal squarely placed before the Court, there is ample authority in South Carolina to determine the question as to when the time for filing an appeal commences. See, for example, S.C. Department of Mental Health v. Glass, 269 S.C. 91, 236 S.E.2d 412 (1977); Brewer v. S.C. State Highway Dept., 261 S.C. 52, 198 S.E.2d 256 (1973); O'Rourke v. Atlantic, 91 S.C. 399, 74 S.E. 930 (1912); O'Neal v. Atlas, 168 S.C. 174, 167, S.E. 227 (1933).

Having no certified record from which to base a decision the alleged jurisdictional issue, this Court is compelled to conclude that the argument of the Highway Department on this issue cannot succeed.

II. The Substantive Issue on Appeal

In its petition filed on January 14, 1983, the Highway Department argued that the decision of the Review Panel must be reversed on the following grounds:

(a) The decision was clearly erroneous in view of the reliable, probative, and substantial evidence on the whole record;

(b) The decision was arbitrary and capricious and was characterized by abusive discretion.

(c) The conclusions of law are not supported by the findings of fact.

Although, the Petition filed by the Highway Department is unfortunately not more specific than that which is set out above, the Court has undertaken to review the documents which were filed as a transcript of the proceedings in an effort to determine if this case was infected with any error as prohibited by S.C. Code Ann. §1-23-380(g) (1983 Cum. Supp.).

From the outset it is concluded that although paragraph (c) above is not per se an error listed under the Administrative Procedures Act, this Court interprets paragraph (c) as being another way of stating paragraph (a).

The record under consideration provides no basis whatsoever for a finding that the decision of the Review Panel is arbitrary or capricious or characterized by abusive discretion and therefore this ground of appeal is denied.

This leaves for consideration only paragraph (a) which is a determination of the issue of whether the decision was clearly erroneous in view of the reliable, probative, and substantial evidence in the whole record.

The Review Panel in its findings of fact and conclusions of law found that witness, Ms. Nancy Temple, an employee of the S.C.

Department of Highways and Public Transportation, was an agent with apparent authority to bind the department and that her signature on a document captioned "proof" without any "...notation or restriction as to type size or submission of a finished set with carbon..." was a waiver of those requirements in the contract specifications. (order of the Review Panel, page 3). This finding and conclusion of the Review Panel is clearly erroneous in view of the reliable, probative and substantial evidence on the whole record.

The concept of apparent authority or agency by estoppel depends upon a manifestation by the alleged principal to a third party, coupled with a reasonable belief by the third party that the alleged agent is authorized to bind the principal. Beasley v. Kerr McGee Chemical Corp., Inc., 273 S.C. 523, 257 S.E.2d 726, (1979). The general rule with respect to apparent authority to bind another requires 1) a representation by the principal, 2) a reliance upon it by a third party, and 3) a change of position by such a person in reliance upon the representation. All three elements must be present. ZIV Television Programs, Inc. v. Associated Grocers, Inc. of S.C., 236 S.C. 448, 114 S.E.2d 826 (1960); See also Moore v. Pilot Life Insurance Company, 205 S.C. 474, 32 S.E.2d 757 (1944); and Tobacco Redrying Corp. v. U.S. Fidelity and Guaranty Company, 185 S.C. 162, 193 S.E. 426 (1937).

One who alleges the existence of a principal agent relationship has the burden of proving that the alleged agent had real or apparent authority to act for the principal. Fochtman v. Clanton's Auto Auction Sales, 233 S.C. 581, 106 S.E.2d 272 (1959) See also Esslinger's, Inc. v. Murray Bros., 195 S.C. 34, 11 S.E.2d 381 (1940).

The critical document in this case is marked as Appellant's Exhibit A, is entitled "Quotation" and is dated May 31, 1982. It is signed by J. G. Freeman, Director of Purchasing of the S.C. Department of Highways and Public Transportation and B. Sease for Data Tec. The document, both parties acknowledge, bore the statement, "Before printing, contact D. R. Cherry of the Oversize Permit Office at 803-758-3310 to determine proper wording and spacing, submit finished set with carbons for proofreading, trial on typewriter and checking quality of carbon copies."

Witness Temple was identified by Mr. Sease as a Secretary who was employed by Mr. Cherry. Mr. Sease testified that he received a copy of the proof on August 10 and called Mr. Cherry who was out of town. He talked to Ms. Temple and asked her if she could approve the proof. He testified that she said "yes" and that he went to her office and went over the entire form and that is when she signed the proof (Trans. page 13). Mr. Sease also acknowledged at Trans. page 15 the essence of the statement quoted above which appears on Appellant's Exhibit A. He also acknowledged that Ms. Temple told him that she believed the printing might be too small. (Trans. page 19). Mr. Sease also said that he asked Ms. Temple if she could approve the proof and she said "yes" (Trans. page 21).

Ms. Temple testified that Mr. Sease called and wanted to speak to Mr. Cherry and that she told him that Mr. Cherry was on vacation. She testified that Sease said that he wanted to know if someone could sign for the permits that he ordered "...and I hesitated but I told him I said I suppose I can do it." She further stated that she told him "...sure bring it on up (the proof) and I will look at it." (Trans. page 42). She said that as soon as she looked at the proof that she could tell that the type was small and that she told him that it was. She stated that her concern was that the "...customer that picks up the permit is not going to be able to read it..." (Trans. page 43) Her testimony was that when she signed the proof, she expected Mr. Sease to bring back a "...finished set." She also testified that she told Mr. Sease that Mr. Cherry needed to see the forms (Trans. page 45) and that she said that she could sign for it (the proof) if necessary (Trans. page 45). Ms. Temple stated further that the reason that she signed the form was that she thought she was approving the "spelling..the wording was o.k." She testified that she did not tell Mr. Sease that she had authority to sign the proof, but that "...I told him that I suppose that I could look at it." She signed the proof willingly "...because I looked at the proof and the spelling was o.k. and the wording was o.k."..,.(Trans. page 53).

Appellant's Exhibit C has four boxes near the top of the form relating to the production. These lines are as follows:

Check this box 1	/__/	if production may continue <u>exactly</u> according to the attached. (the underlined word is in bold print on the exhibit)
Check this box 2	/__/	if production may continue according to the attached as corrected or changed.
Check this box 3	/__/	if a revised proof is desired before actual production.
Check this box 4	/__/	if revised pricing, if any, is desired prior to continuing production.

The fact that none of the above boxes are checked tends to support Ms. Temple's testimony that she signed the proof believing that she was only indicating that the spelling and wording were acceptable. The above choices on the proof all relate to the production of the item and instruct the printer as to the production. Absent a check mark in one of these boxes there is no instruction to the printer to commence production.

Of the three elements necessarily present before an apparent agency relationship is established, at best the record establishes a change in position by Data Tec. This change in position, however, was not brought about by any representation of the principal, the Highway Department, nor was there reliance based upon any such representation. Appellant's Exhibit A sets out clearly the requirements of the order. Even accepting the testimony of Mr. Sease this record does not provide the kind of factual support required by the cases in order to find an apparent agency relationship.

The finding and conclusion of the Review Panel as to Ms. Temple's apparent authority is clearly erroneous in view of the reliable, probative and substantial evidence on the whole record and therefore the Order of the Review Panel is hereby reversed.

AND IT IS SO ORDERED.

SOUTH CAROLINA
PROCUREMENT REVIEW PANEL

/s/ James C. Harrison, Jr.
JAMES C. HARRISON, JR.
Special Circuit Judge

Columbia, S.C.
May 29, 1984.

STATE OF SOUTH CAROLINA	)	BEFORE THE SOUTH CAROLINA
	)	PROCUREMENT REVIEW PANEL
COUNTY OF RICHLAND	)	CASE NO. 1982-4
IN RE:	)	
	)	
PROTEST BY HONEYWELL, INC.	)	O R D E R

This matter is before the South Carolina Procurement Review Panel as a result of a Protest of Contract Award and the Request for Review of the ensuing Determination concerning a contract awarded to Richland Memorial Hospital by the Materials Management Office, Division of General Services, on or about September 29, 1982, for the furnishing of Preventive Maintenance and Repair Service on Clinical and Biomedical Equipment to the South Carolina Department of Mental Retardation. A Protest of Award was filed in this matter by Honeywell, Inc. under Section 11-35-4210(1), South Carolina Code of Laws (1976), as amended, on or about October 18, 1982, on the grounds that the Resident Vendor Preference should not have been applied in this matter; that Richland Memorial Hospital did not qualify for the preference even if the preferen was applicable; that Honeywell, Inc. had been misled on its right to claim the preference; and that the Resident Vendor Preference should not be applied on the ground that it is unconstitutional and therefore void.

A hearing was held by Mr. Richard J. Campbell, Acting Materials Management Officer, on November 4, 1982. In attendance were representatives of the Materials Management Office, Honeywell, Inc., the South Carolina Department of Mental Retardation, and Richland Memorial Hospital. Following that hearing, a decision was rendered on or about November 12, 1982, which upheld the Contract Award and determined that the Resident Vendor Preference had been correctly utilized;

that Richland Memorial Hospital had made a written claim as statutorily required for the preference and met the statutory requirements for resident vendor status under Section 11-35-1520(9)(d); that Honeywell, Inc.'s failure to claim the preference was not due to mistake, inadvertence, or misrepresentation; and that the Resident Vendor Preference carried the presumption of constitutionality.

On November 16, 1982, Honeywell, Inc. requested a Review of the Decision of the Acting Materials Management Officer before the Procurement Review Panel. Pursuant to its authority under Section 11-35-4410, Code of Laws of South Carolina (1976), as amended, a hearing was held before the Review Panel on December 7, 1982. Testimony was taken and evidence received from representatives of Honeywell, Inc., Richland Memorial Hospital, and the Division of General Services. All parties were represented by legal counsel.

FINDINGS OF FACT

On or about August 30, 1982, the Materials Management Office of the Division of General Services issued a Bid Invitation for Preventative Maintenance and Repair Service on Clinical and Biomedical Equipment, Bid Number 6-793-1116200-09/20/82-P. These services were to be furnished to the South Carolina Department of Mental Retardation. Bids were received until September 20, 1982. The Bid submitted by the Protestant, Honeywell, Inc., carried a vendor mailing address in Atlanta, Georgia. The "South Carolina Resident Vendor Preference Request" on the Bid form was unsigned. Honeywell, Inc.'s Bid was on the Alternate 1, $156,180.00. Richland Memorial Hospital submitted a Bid on Alternate 1 of $156,297.00. Richland Memorial Hospital

claimed Resident Vendor Preference on its Bid. The application of the statutory two (2%) percent preference rendered the Bid of Richland Memorial subject to acceptance. On September 29, 1982, a Statement of Award was made to Richland Memorial Hospital by the Materials Management Office for this contract, Number 6-793-28035-09/20/82-P.

The first grievance raised by Honeywell, Inc. is that the Resident Vendor Preference does not apply because both Honeywell, Inc. and Richland Memorial Hospital are resident vendors. Section 11-35-1520 is very clear. The statute requires the preference may be applied only between a resident and a non-resident vendor and "...if such resident vendor has made written claim for such preference at the time the Bid was submitted". The evidence clearly shows that Honeywell, Inc. submitted its Bid from an out-of-state address and did not claim Resident Vendor Preference. Irrespective of whether or not Honeywell, Inc. claims to maintain offices in this State which may or may not meet the resident vendor requirements, the Bid Form is the only means by which the Materials Management Office may lawfully determine resident status. The facts demonstrate that no error was committed in granting the Resident Vendor Preference to Richland Memorial Hospital in the Award of this contract.

The second grievance Honeywell, Inc. raises is that, even if the preference is applicable under these facts, Richland Memorial Hospital may not receive the preference on the ground that it fails to meet the residence requirements outlined in Section 11-35-1520(9)(d). A vendor is deemed to be a resident for preference purposes if that vendor is (1) an individual, partnership, or corporation authorized to transact business within the State; (2) maintains an office in this

State; (3) maintains a representative inventory of commodities on which the Bid is submitted; and (4) has paid all taxes duly assessed. Richland Memorial Hospital is a chartered, non-profit corporation with the authority to operate any scientific department which betters the facilities for patient care at the Hospital. Resultant from this express authority is the implied authority for the operation of business enterprises as a means to provide income for the Hospital or expanded Hospital services. There is nothing in the enabling legislation of Richland Memorial Hospital prohibiting either profit-making or non-charitable activities. The Panel finds it unnecessary to hold, however, that the activity in issue here, the furnishing of service and maintenance for Biomedical Equipment to outside institutions, bears a definite relation to the Hospital's purpose since it was held in eborde v. St. Michael and All Angels Church, 272 S.C. 490, 252 S.E.2d 876 (1979), relying on Section 33-3-30, South Carolina Code of Laws (1976), that only members of a chartered organization have standing to raise the issue of whether or not acts in question are beyond the purpose of that chartered organization. Richland Memorial Hospital is granted the power to enter into contracts by law, and this Panel finds that Richland Memorial Hospital is authorized to do business in this State. That Richland Memorial Hospital may be non-profit and tax-exempt does not bar it from resident status. Richland Memorial Hospital pays sales taxes. That no other taxes may be duly assessed does not invalidate its claim to Resident Vendor Status. The testimony before the Panel is that Richland Memorial Hospital has paid all taxes duly assessed against it and is otherwise fully qualified to receive preference. There is no bar in the Procurement Code against granting

the preference to tax-exempt, non-profit corporations, such as Richland Memorial Hospital. The testimony before the Panel is that Richland Memorial Hospital is fully able to fulfill this contract and that equipment sufficient for service and maintenance is maintained. The record demonstrates that Richland Memorial Hospital maintains an office in this State and that it is a chartered, non-profit corporation empowered to enter into contracts under the laws of this State. Therefore, the Panel finds that Richland Memorial Hospital does qualify for the Resident Vendor Preference.

Honeywell, Inc.'s third grievance alleges that its failure to claim the Resident Vendor Preference was directly attributable to employees of the Department of Mental Retardation. The Bid Invitation clearly directed that all inquiries concerning the Bid Invitation were to be made to Bill McLeod, Purchasing Assistant for the Materials Management Office. No such inquiries were made. Testimony before the Materials Management Officer and the Panel was that employees of the Department of Mental Retardation did not instruct employees of Honeywell, Inc. that Honeywell did not qualify for the Resident Vendor Preference. Therefore, the Panel finds that Honeywell, Inc.'s failure to sign the Resident Vendor Preference claim was not due to any alleged mistake, inadvertence, or reliance on alleged misrepresentations made by employees of the Department of Mental Retardation.

The fourth grievance of Honeywell, Inc. concerns the constitutionality of the Resident Vendor Preference. The Panel finds that the statutory preference is presumptively valid.

CONCLUSIONS OF LAW

1. The Panel accordingly finds that the Protestant, Honeywell, Inc., is not entitled to make a claim for Resident Vendor Status following the time for the receipt of Bids. On the face of the Bid Document, Honeywell, Inc. is a non-resident vendor submitting its Bid from an out-of-state address. Honeywell, Inc. is, therefore, bound by those documents and may not now deprive Richland Memorial Hospital of its claimed Resident Vendor Preference on the basis of its own failure to assert resident status.

2. The Panel further holds that Richland Memorial Hospital qualifies for the Resident Vendor Preference.

3. The Panel further holds that Honeywell Inc.'s failure to claim the Resident Vendor Preference was not due to mistake, inadvertence, or justified reliance. The Bid Invitations were published by the Materials Management Office. Inquiries were directed to be made to that Office. No inquiry was made by the Protestant concerning its ability to claim Resident Vendor Status.

4. The Panel further holds that the Resident Vendor Preference is a statutory enactment of the Legislature of this State and must be presumed to be constitutional by this Panel until such time as the Supreme Court of this State may hold otherwise.

IT IS THEREFORE ORDERED that the Determination of the Acting Materials Management Officer be upheld and affirmed and that the Protest of that Decision is denied.

IT IS SO ORDERED.

THE SOUTH CAROLINA PROCUREMENT REVIEW PANEL

Senator Hugh K. Leatherman
Chairman

December 13th, 1982.

STATE OF SOUTH CAROLINA)
) IN THE COURT OF COMMON PLEAS
COUNTY OF RICHLAND)

In the Matter of:
Honeywell, Inc.,
Appellant,

vs.

Materials Management Office,
Division of General Services,
State of South Carolina,

Respondent.

ORDER

This matter came before me for a hearing on October 17, 1983, on appeal from a final decision of the South Carolina Procurement Review Panel, pursuant to the provisions of S. C. Code Ann., §1-23-380 (Supp. 1982). Both parties, as well as other interested persons who had appeared in the various administrative hearings, were represented by counsel at the hearing. Since this is an appeal from an agency decision, governed by the dictates of the South Carolina Administrative Procedures Act, S. C. Code Ann., §1-23-380, et seq., (Supp. 1982), I have considered only the record certified for appeal. Further, I am mindful of the limitations placed upon me by the provisions of S. C. Code Ann., §1-23-380(g) (Supp. 1982) which provides as follows:

> The court [on review] shall not substitute its judgment for that of the agency as to the weight of the evidence on questions and fact. The court may affirm the decision of the agency or remand the case for further proceedings. The court may reverse or modify the decision if substantial rights of the appellant have been prejudiced because the administrative findings, inferences, conclusions or decisions are:
>
> (1) In violation of constitutional or statutory provisions;
>
> (2) In excess of the statutory authority of the agency;
>
> (3) Made upon unlawful procedures;
>
> (4) Affected by other error of law;
>
> (5) Clearly erroneous in view of the reliable, probative and substantial evidence on the whole record; or

(6) Arbitrary and capricious or characterized by abuse of discretion or clearly unwarranted exercise of discretion.

The following statement of facts is taken primarily from the Transcript of the proceedings before Mr. Richard Campbell, Acting Materials Management Officer, South Carolina Division of General Services, held November 4, 1982, and the various administrative decisions. Certain documents referred to herein are a part of the record in this matter, having been attached to Honeywell's Protest and Memorandum.

On or about March 2, 1982, the Division of General Services, Central State Purchasing, of the State of South Carolina, solicited sealed bids (Bid Number 6-793-111620-01/31/82) for a contract to perform "preventive maintenance and repair service on Clinical and Biomedical Equipment from June 1, 1982, through may 31, 1985." Honeywell, Inc. (Hereinafter "Honeywell"), and Richland Memorial Hospital (hereinafter "RMH"), among others, submitted bids in response to this bid invitation.

Honeywell was ultimately deemed low bidder at approximately $200,000.00. RHM's bid was approximately $400,000.00. Following the bid closing date, and on or about April 29, 1982, the contract administrator, Roy G. Smarr, Jr., of the South Carolina Department of Mental Retardation, telephoned Gary R. Jones, Biomedical Account Manager, Instrumentation Services Division of Honeywell, and requested that Honeywell submit proposed revisions to Honeywell's previously submitted bid. By letter dated April 29, 1982, to Mr. Smarr, Honeywell proposed certain revisions to its bid. Thereafter, and on or about June 29, 1982, Mr. Smarr wrote Mr. Jones a letter requesting updating of Honeywell's original equipment inventory list, as revised, and advised Honeywell that the State of South Carolina, Department of Mental Retardation, would like to "go with your alternate bid . . ." and further advised Honeywell that "[u]pon receipt of updated and approved inventory list, we will include same list in [the] contract."

Honeywell complied with Mr. Smarr's request and, based upon his representations, fully expected to be awarded the contract. However, on or about August 30, 1982, a revised bid invitation (Bid Number 6-793-116200-09/20/82-P) was issued by the State of South Carolina. Honeywell submitted the low bid, at $156,000.00, in response to the second invitation to bid, and RMH submitted the next lowest bid, at $156,297.00.

S.C. Code Ann., §11-35-1520(9)(d) (Supp. 1982) allows a governmental body to extend a preference to a responsive and responsible resident vendor, for procurements under $2.5 million, if the bid of the resident vendor does not exceed the lowest qualified bid from a nonresident vendor by more than 2% of the nonresident

vendor's bid and the resident vendor has made written claim for the preference at the time of submission of bids. Honeywell is a corporation authorized to transact business within the State of South Carolina, maintains an office in the State of South Carolina, maintains a representative inventory of commodities on which the bid is submitted and has paid all taxes duly assessed, but Honeywell failed to claim the resident vendor preference on its bid, allegedly due to the fact that Messrs. Erich Tata and Roy Smarr of the Department of Mental Retardation, advised Honeywell's employees that Honeywell did not qualify for the preference and the preference was unimportant. Messrs. Smarr and Tata denied making these representations. RMH, on the other hand, claimed the preference and, on or about October 8, 1982, Honeywell learned through a telephone conversation its counsel had with Ms. Barbara McMillan, of the South Carolina Attorney General's Office, that a Statement of Award and a Purchase Order had been issued sometime during the week of October 4, 1982, to RMH, awarding RMH the contract.

Honeywell mailed its protest in writing to Mr. Richard Campbell, Acting Materials Management Officer, Division of General Services of the State of South Carolina, on October 15, 1982, pursuant to S.C. Code Ann., §11-35-4210 (Supp. 1982), and submitted four grievances for consideration:

1. The preference accorded resident vendors does not apply in this case because both Honeywell and RMH are resident vendors;
2. RMH does not qualify for the preference, even if it is applicable in this case;
3. Even if the preference is applicable and RMH qualifies for the preference, the contract should be awarded to Honeywell due to the fact that Honeywell submitted the low bid and Honeywell's failure to claim the preference was due to mistake, inadvertence, and reliance upon representations of the State; and,
4. Even if the preference given resident vendors is applicable, such preference unconstitutionally discriminates against nonresidents and, therefore, is void.

On November 4, 1982, a hearing on Honeywell's protest was held by Mr. Campbell and, as a result of that hearing, Mr. Campbell issued a decision, on or about November 12, 1982, which upheld the contract award and denied Honeywell's protest on the grounds that the resident preference of §11-35-1520 had been correctly applied in this case. Honeywell's failure to claim the preference was not due to mistake, inadvertence or misrepresentation, RMH qualified for the preference and the resident vendor preference carried the presumption of constitutionality.

On or about November 16, 1982, Honeywell requested a review of the decision of the Acting Materials Management Officer before the South Carolina Procurement Review Panel, pursuant to §11-35-4410 of the S.C. Code (Supp. 1982), and a hearing was held before the Review Panel on December 7, 1982. Representatives of Honeywell, RMH and the S.C. Division of General Services were present and represented by Counsel at this hearing. On December 13, 1982, the Review Panel issued its Determination, affirming the decision of the Acting Materials Management Officer, in all respects.

Having exhausted all administrative remedies available and having been aggrieved by a final decision of the Review Panel, pursuant to the provisions of S.C. Code Ann., §§11-35-4210, et. seq. (Supp. 1982), Honeywell, by Petition dated January 12, 1983, sought judicial review of the final decision of the Review Panel, pursuant to the provisions of .C. Code Ann., §1-23-380 (Supp. 1982).

The in-state preference accorded by S.C. Code Ann., §11-35-1520(9)(d) (Supp. 1982) does not apply where, as here, the two lowest bidders are resident vendors. Section 11-35-1520(9)(d), in pertinent part, provides:

> Competitive procurements made by any governmental body shall be made from a responsive and responsible vendor resident in South Carolina . . . if such bid does not exceed the lowest qualified bid from a nonresident vendor by more than two percent of the latter bid, and if such resident vendor has made written claim for such preference at the time the bid was submitted . . . [Emphasis added.]

Even a cursory reading of this statute reveals that there are two prerequisites set forth in the statute before the resident vendor preference can be applied: (1) the bid of a resident vendor must not exceed that of a nonresident vendor by more than 2%; and, (2) the resident vendor must claim the preference in writing at the time of submission of its bid. Under the plain wording of the statute, the preference may be applied only where the two low bidders are a resident and a nonresident vendor. If the two low bidders are resident vendors, the preference afforded by the statute does not apply at all. The question becomes, therefore, whether or not Honeywell qualifies, under the statutory definition, as a "resident vendor."

The statute defines a "resident vendor" as "an individual, partnership, association or corporation that is authorized to transact business within the State, maintains an office in the State, maintains a representative inventory of commodities on which the bid is submitted and has paid all taxes duly assessed." S.C. Code Ann., §11-35-1520(9)(d). The statute does not require that the resident vendor preference be claimed, in writing, in order for a bidder to be classified as a resident vendor. Honeywell is

authorized to do business in South Carolina, maintains offices in Columbia and Greenville, maintains an inventory of all commodities needed for the performance of the contract and has paid all taxes duly assessed by the State of South Carolina. Honeywell is, therefore, a resident vendor by definition and the in-state preference does not apply in this case.

The state procurement office handling the bid apparently treated Honeywell as a nonresident vendor since Honeywell did not claim the preference on the bid invitation form and gave an out-of-state address on the bid forms. Requiring a bidder to claim the preference as a condition to treating the bidder as a resident vendor is contrary to the plain wording of both §11-35-1520(9)(d) and the bid invitation. Both the statute and the bid invitation require a bidder to sign the preference blank, only if the bidder is seeking to exercise the preference against nonresident vendor bidders.

Under well-settled canons of statutory construction, where the legislature has carefully employed a term in one portion of the statute and excluded it in another, it should not be implied where excluded. Federal Trade Commission v. Sun Oil Co., 371 U.S. 505, 515 (1963); Marshall v. Western Union Telegraph Company, 621 F.1d 1246, 1251 (3rd Cir. 1980); 73 Am.Jur.2d, Statutes, 211, at 405 (1971).

In Section 11-35-1520(9)(d), the legislature carefully required bidders seeking to prevail on the basis of the resident vendor preference to make a written request for the preference. Within the same subsection of the statute, the legislature defined "resident vendor," but the legislature did not make claiming the resident vendor preference a condition for being treated as a resident vendor.

An examination of the language of the statute reveals that the first part of §11-35-1520(9)(d) concerns the conditions for granting an in-state preference to a resident vendor. It requires: (1) that the bid of a responsive and responsible resident vendor not exceed the bid of a nonresident vendor by more than two percent; and, (2) that the resident vendor claiming the preference make a written request for the preference at the time the bid is submitted. The second part of §11-35-1520(9)(d) defines a resident vendor to be a ". . . corporation that is authorized to transact business within the State, maintains an office in the State, maintains a representative inventory of commodities on which the bid is submitted and has paid all taxes duly assessed." Unlike the portion of the statute providing for the in-state preference, this portion of §11-35-1520(9)(d) does not require a bidder to make a written request to be treated as a resident vendor nor should such a requirement be implied. Resident status occurs by reason of a bidder's falling within the statutory definition and is not lost by failure to request the in-state preference. Any other interpretation of §11-35-1520(9)(d) would be contrary to the plain language of the statute. For the foregoing reasons, it is clear that the

Procurement Review Panel erred in applying the law to the facts of this case and, therefore, the decision of the Procurement Review Panel should be reversed.

Having determined that the Procurement Review Panel erred in applying the law to the facts of this case, it becomes unnecessary to explore the remaining issues raised by Honeywell in this appeal.

Under the circumstances, the Court would normally simply reverse the Procurement Review Panel and remand this matter to the Panel for consideration of the question of what relief Honeywell is entitled to. The Court has considered this option, but rejects it in the interest of judicial economy. If the Court were to simply reverse the Panel and remand this case to the Panel in order to allow the Panel to fashion appropriate relief, one or the other of the parties might be dissatisfied with the relief accorded and another appeal could result. RMH has been performing under the contract for over one year and the contract expires in less than two years. Accordingly, it is conceivable that this entire controversy could become moot by the time a final disposition is made of this case. It does not appear to the Court that the interests of justice would best be served by simply remanding this matter to the procurement review panel for further proceedings.

The Court is of the opinion that the interests of justice dictate that the Court hold another hearing in this matter, at which time all parties and interested persons who have previously appeared in this cause will be given an opportunity to present their views as to what relief is appropriate to be awarded to Honeywell in this case. Should those appearing deem it necessary and helpful to the Court, the Court will admit additional evidence, otherwise admissible under the rules of evidence, which may bear upon the issue of what relief is appropriate. For example, and not by way of limitation, Honeywell has requested that it be awarded the contract. The record is silent as to what effect, if any, an order which awarded the contract to Honeywell would have upon the existing contract and the services being performed thereunder.

In view of the fact that an additional hearing as to relief is necessary, it is the intent of this Order that it be deemed interlocutory in nature and it shall not become final until appropriate relief has been fashioned. The Court does not wish to place the parties in the position of having to appeal this Order to protect their rights, as well as a later Order which will deal with what relief is appropriate in this case. Accordingly, this Order shall not become final until further Order of this Court. For the foregoing reasons,

IT IS, THEREFORE, ORDERED that the decision of the Procurement Review Panel be, and it is hereby, reversed. It is further

ORDERED that this matter be set for hearing before me to give all interested parties who have heretofore appeared in this cause an opportunity to present their views, including introduction of

appropriate additional evidence, to the Court concerning what relief should be accorded Honeywell. It is further

ORDERED that this Court shall retain jurisdiction in this matter until final disposition of the matters and things herein discussed and that this Order shall not become final, for purposes of appeal, until further Order of this Court.

IT IS SO ORDERED.

/s/James C. Harrison, Jr.
James C. Harrison, Jr., Special Judge
Fifth Judicial Circuit

Columbia, South Carolina

December 13, 1983.

STATE OF SOUTH CAROLINA) COUNTY OF RICHLAND)	IN THE COURT OF COMMON PLEAS No. 83-CP-40-0168
In the Matter of: Honeywell, Inc., Appellant,) vs.) Materials Management Office, Division of General Services, State of South Carolina,) Respondent.)	ORDER

This matter came before me for a hearing on March 29, 1984. At issue between the appearing parties was the question of what relief should be granted to Honeywell as the result of this court's Order dated December 13, 1983, reversing the decision of the Procurement Review Panel and concluding that the contract here in issue should have been awarded to Honeywell. The Procurement Review Panel, the Materials Management Office, Richland Memorial Hospital and Honeywell were represented by counsel at the hearing.

All parties except Honeywell questioned the authority of the undersigned, who was serving as Special Circuit Judge during the term at which the original hearing was held. The Court is of the opinion, however, that the present matter is an outgrowth of the original hearing and that the judge who granted the original relief retains the power to decide matters incident thereto. Accordingly, the motion that the hearing should be postponed to another Circuit Judge at another term of court is denied.

Testimony was presented by Honeywell as to the amount of expenses it claims to have incurred in connection with the bid preparation. The parties stipulated that the legal fees incurred by Honeywell to date were reasonable, although the precise amount of fees incurred in connection with the March 29 hearing had not been determined. The State respondents presented the testimony of a Department of Mental Retardation official who offered a letter indicating the Department's desire to terminate the contract with Richland Memorial as soon as possible and to perform the work itself. This request is still under advisement with the Materials Management Office, but if honored could result in the termination of the contract over a year prior to its scheduled expiration date.

At the hearing, Honeywell announced its intention not to pursue the remedy of lost profits under the contract. Honeywell had

originally sought a mandamus order compelling the award of the remainder of the contract to it, or an order declaring the present contract void and reopening bidding. However, after the testimony made it clear that the Department of Mental Retardation intends to perform the contracted-for work itself as soon as possible, Honeywell announced that it was no longer seeking the aforementioned remedies and that it was instead seeking only the recovery of costs incurred, including costs connected with the present legal proceedings.

Section 11-35-4210(7) provides specifically for the remedy of reimbursement of bid costs by requiring the protestant to apply to the Procurement Review Panel for "reimbursement of the actual costs, not to exceed five thousand dollars, incurred in connection with the solicitation including bid preparation." The same subsection further provides that the Panel "may order the computation of a reasonable amount and make such recommendations to the [Budget and Control] board as it deems equitable, including reimbursement of bid preparation costs, not to exceed five thousand dollars, and other relief."

In the view of the Court, it would be appropriate for the Panel to make the initial finding as to the appropriate degree of compensation to be awarded to Honeywell, and the matter is accordingly remanded to the Panel for the sole purpose of considering the amount of relief to which Honeywell is entitled under Section 11-35-4210(7). In ordering this remand, the Court deems it unnecessary to decide whether Section 11-35-4210(7) provides the exclusive procedure for determining the amount of an award of this nature. Likewise, the Court expresses no opinion as to what may be considered by the Panel in awarding monetary relief, and whether the $5,000 limit constitutes the maximum monetary award which may be made. However, the Court instructs the Panel that it should consider only monetary relief, and that the Court's decision that Honeywell should have been awarded the contract precludes the Panel from re-examining the question as to who should have been awarded the contract.

For the foregoing reasons; then, it is ordered that this matter be remanded to the Procurement Review Panel for the sole purpose of determining the extent of monetary relief to be awarded to Honeywell.

AND IT IS SO ORDERED.

/s/ James C. Harrison
James C. Harrison
Special Circuit Judge

April 13, 1984

STATE OF SOUTH CAROLINA	)	BEFORE THE SOUTH CAROLINA
	)	PROCUREMENT REVIEW PANEL
COUNTY OF RICHLAND	)	CASE NO. 1983-2

IN RE:	)	
	)	
PROTEST BY AMERICAN STERILIZER COMPANY	)	O R D E R
	)	

This matter is before the South Carolina Procurement Review Panel (hereinafter "Review Panel") for administrative review pursuant to Section 11-35-4210(5) and Section 11-35-4410(5), South Carolina Code of Laws (1976), as amended, as a result of a Bid Protest filed under Section 11-35-4210(1), South Carolina Code of Laws (1976), as amended, and a Request for Review of the Determination issued by the Chief Procurement Officer for Construction from that Protest pursuant to his authority granted by Section 11-35-4210(2) and Section 11-35-4210(3).

FINDINGS OF FACT

On or about November, 1982, the Medical University of South Carolina issued an Invitation for Bids (IFB) for the construction of a proposed children's hospital addition to that facility. This project is to be constructed under the multiple contract method of construction. There are approximately twenty (20) multiple prime contracts offered in the Invitation for Bids. The Bid from which this appeal arises is for the modular casework contract.

In February of 1983, the Protestant, AMSCO, submitted a Bid Proposal for Bid Package No. 2, the modular casework contract. The Bid was submitted on the fourteen (14) page "Form of Proposal" which was a part of the Bid Invitation. A Bid Bond from St. Paul Fire and Marine Insurance Company was attached.

On February 15, 1983, at the scheduled Bid opening, the Bid of the Protestant,

AMSCO, was opened. Several deficiencies were noted in the Bid. The Bid contained an Affidavit of Non-Collusion so incomplete as to be ineffective. In addition, the Bid contained several other defects: On Page FP-13 of the Form of Proposal, the date of the Bid, the contractor's license number and the bidder's license number were omitted by the Bidder.

The State Engineer, acting as contracting officer for the Medical University at the time of Bid opening, rejected the Bid as nonresponsive. AMSCO thereafter secured legal counsel and filed a Protest pursuant to Section 11-35-4210(1), South Carolina Code of Laws (1976), as amended, with the Chief Procurement Officer for Construction. Following a review of the facts, the Chief Procurement Officer for Construction issued a written Decision dated February 23, 1983, pursuant to Section 11-35-4210(3), South Carolina Code of Laws (1976), as amended. This Decision rejected and denied the Protest of AMSCO. The Decision waived as minor deficiencies the omissions in the Bid Documents of the date of the Bid and contractor's and bidder's license numbers. The Chief Procurement Officer ruled that the failure to complete the Affidavit of Non-Collusion by AMSCO was a material failure to conform to the essential requirements of the IFB requiring rejection under Budget and Control Board Regulation 19-445.2070, Section A. The Chief Procurement Officer additionally ruled that rejection was required under Budget and Control Board Regulation 19-445.2070, Subsection D, holding that the failure to complete the Affidavit of Non-Collusion was an attempt to alter the liability of the Bidder to the State in that while the individual signing the Bid might be held liable in the event of Bid collusion, the corporate Bidder would ostensibly not be bound by the Affidavit. By letter dated March 2, 1983, the Protestant sought an administrative review of the Chief Procurement Officer's Decision and requested a hearing before the Procurement Review Panel as provided under Section 11-35-4210(5), South Carolina Code of Laws (1976), as amended.

The deficiencies, other than the unenforceable Affidavit of Non-Collusion, were properly waived by the Chief Procurement Officer and are not before the Panel on this appeal. The sole issue on this appeal is whether the Bidder's failure to include an enforceable Affidavit of Non-Collusion renders its Bid nonresponsive or whether under pertinent Regulations the failure to include an enforceable Affidavit may be waived or cured.

The Affidavit of Non-Collusion was required by the IFB, which stated at Page IB-7 of Volume 0, Paragraph 23, that:

> "An affidavit of non-collusion shall be attached to and be part of the Contractor's bid. Any bid submitted without this affidavit will be incomplete and may be rejected."

The Affidavit itself, in the instructions, clearly states:

> "Each contractor submitting a bid must complete this form as an affidavit of non-collusion. This sworn statement will be considered part of the Contractor's bid. Any bid submitted without this information will be incomplete."

The Affidavit submitted with the Bid of AMSCO, although signed by R. B. Yeager and notarized, failed to state the project name for which the Affidavit was submitted, the Bid Document's date, the Bid opening date, a statement of venue, or the required designation of the signer's name and his membership in the firm bidding for the contrac for which the Affidavit was being submitted. The effect of these omissions is sufficient to render the Affidavit unenforceable against the Bidder. While the incomplete Affidavit may be enforceable against the person signing that Affidavit, it was not the purpose of the IFB requirement to bind an out-of-state corporate officer. The purpose was to bind the corporate Bidder. The Affidavit submitted by AMSCO is tantamount to no Affidavit at all as far as the corporate Bidder is concerned.

Budget and Control Board Regulation 19-445.2070, Subsection A, provides: "Any bid which fails to conform to the essential requirements of the invitation for bids shall be rejected." An omission, then, must render a Bid unresponsive if

the omission goes to an "essential requirement" of the Bid Invitation. To supplement this Regulation, the Regulation 19-445.2080 promulgated by the Budget and Control Board provides a definition of that which may be viewed as non-essential:

> A minor informality or irregularity is one which is merely a matter of form or is some immaterial variation from the exact requirements of the invitation for bids, having no effect or merely a trivial or negligible effect on price, quality, quantity, or delivery of the supplies or performance of the services being procured, and the correction or waiver of which would not affect the relative standing of, or be otherwise prejudicial to bidders. The procurement officer shall either give the bidder an opportunity to cure any deficiency resulting from a minor informality or irregularity in a bid or waive any such deficiency where it is to the advantage of the State.

Examples given are the failure to correctly define corporate size of an incorrect listing of a Bidder's employers, a failure in certain situations to acknowledge the receipt of an amendment to an IFB, and the failure to sign a Bid if a Bid Bond or some other evidence of an intent to be bound to the requirements of the Bid accompanies the Bid.

The Bidder's failure to include an enforceable Affidavit of Non-Collusion has no effect on the price, quality, quantity, or delivery of the supplies or the performance of the services. Nor would permitting it to be cured after Bid opening be prejudicial to other Bidders. Consequently, this Panel may permit the protesting Bidder to cure the defect and submit a valid enforceable Affidavit after Bid opening pursuant to the above-cited Regulation 19-445.2080.

Thus, it is the finding of the Panel that the omissions occurring in the Affidavit of Non-Collusion do not effect price, quality, quantity, or delivery of the supplies or performance of the services being procured, and the correction would no in any manner prejudice other Bidders. The Panel further finds that the omissions occurring in the Affidavit of Non-Collusion are not an imposition of conditions which would limit the Protestant's liability to the State. The Panel further finds that allowing the Protestant to cure the omissions occurring in the Affidavit of Non-Collusi is to the advantage of the State. These findings are further substantiated by the

permissive language of the IFB and the instructions on the face of the Affidavit, neither of which require rejection of a Bid due to a failure in compliance.

Additionally, the Panel notes and bases its holding upon the finding that Page FP-13 (Revised) of the Bid Documents submitted by the Protestant contains a statement of non-collusion which is signed by and is binding on the corporate Bidder.

CONCLUSIONS OF LAW

1. Under the requirements of the IFB and the Affidavit of Non-Collusion as before this Panel in the present case, a failure to complete the Affidavit, so as to make it nonenforceable against the corporate Bidder, is not a failure to conform to the essential requirements of the IFB so as to require rejection of the Bid of the Protestant under Budget and Control Board Regulation 19-445.2070(A).

2. Under the requirements of the IFB and the Affidavit of Non-Collusion as before this Panel in the present case, a failure to submit a valid Affidavit is not an imposition of conditions limiting the liability of the Protestant to the State so as to require rejection of the Bid of the Protestant under Budget and Control Board Regulation 19-445.2070(D).

3. Under the requirements of the IFB and the Affidavit of Non-Collusion as before this Panel in the present case, the failure to submit an enforceable Affidavi has no effect on price, quality, quantity, or delivery of supplies, or performance of services being procured and a waiver or correction of these omissions would not affect the standing of or be otherwise prejudicial to Bidders.

4. Under the case as presented to the Panel in the above-cited matter, it is the decision of the Panel that the language of the IFB and the instructions on the face of the Affidavit do not mandate the rejection of the Bid of the Protestant, AMSCO, as nonresponsive.

5. Under the case as presented to the Panel in the above-cited matter, it is the decision of the Panel that Page FP-13 (Revised) of the Bid Documents submitted

by the Protestant, AMSCO, contains a statement of non-collusion signed by and binding on the corporate Bidder.

6. Under the case as presented to the Panel in the above-cited matter, it is the decision of the Panel that a waiver or correction of the deficiencies and omissions occurring on the face of the Affidavit of Non-Collusion before the Panel is to the advantage of the State.

This matter is thus remanded to the Chief Procurement Officer for Construction who shall, upon the request of the Protestant, AMSCO, allow the Protestant to cure those deficiencies occurring on the face of the Protestant's Affidavit of Non-Collusion.

IT IS SO ORDERED.

SOUTH CAROLINA PROCUREMENT
REVIEW PANEL

SENATOR HUGH K. LEATHERMAN,
CHAIRMAN

March 30, 1983.

STATE OF SOUTH CAROLINA	)	BEFORE THE SOUTH CAROLINA
	)	PROCUREMENT REVIEW PANEL
COUNTY OF RICHLAND	)	CASE NO. 1983-3

IN RE:)
)
PROTEST BY MCC POWERS-TRANSITUBE) O R D E R
)

This matter is before the South Carolina Procurement Review Panel (hereinafter "Review Panel") for administrative review pursuant to Section 11-35-4210(5) and Section 11-35-4410(5), South Carolina Code of Laws (1976), as amended, as a result of a Bid Protest filed under Section 11-35-4210(1), South Carolina Code of Laws (1976), as amended, and a Request for Review of the Determination issued by the Chief Procurement Officer for Construction from that Protest pursuant to his authority granted by Section 11-35-4210(2) and Section 11-35-4210(3).

FINDINGS OF FACT

On or about November, 1982, the Medical University of South Carolina issued an Invitation for Bids (IFB) for the construction of a proposed children's hospital addition to that facility. This project is to be constructed under the multiple contract method of construction. There are approximately twenty (20) multiple prime contracts offered in the Invitation for Bids. The Bid from which this Appeal arises is for the Pneumatic Tube Contract.

On February 15, 1983, Bids were taken for the construction of the above addition to the Medical University of South Carolina. At the scheduled Bid opening, the Bid of this Protestant, MCC Powers-Transitube, was opened and rejected as being nonresponsive. This rejection was based on the Protestant's failure to include its Affidavit of Non-Collusion in its Bid package. The Protestant retrieved its Bid and left the room, thereafter securing legal counsel and filing a Protest and Petition for a rebid of the contract pursuant to Section 11-35-4210(1), South Carolina Code

of Laws (1976), as amended, with the Chief Procurement Officer for Construction. Following a review of the facts, the Chief Procurement Officer for Construction issued a written Decision dated March 8, 1983, pursuant to Section 11-35-4210(3), South Carolina Code of Laws (1976), as amended. This Decision rejected and denied the Protest and Petition for a rebid of the contract filed by MCC Powers-Transitube. The Chief Procurement Officer ruled that the failure to include an Affidavit of Non-Collusion by the Protestant was a material failure to conform to the essential requirements of the Invitation for Bids requiring rejection under Budget and Control Board Regulation 19-445.2070, Section A, and that an insufficient showing had been made to recommend rebidding the Pneumatic Tube Contract. Following receipt of the Decision of the Chief Procurement Officer for Construction rejecting the Bid Protest and Petition of MCC Powers-Transitube, the Protestant filed an Appeal and Request for Review with the Procurement Review Panel. A hearing in this matter was held on March 31, 1983. The Protestant, MCC Powers-Transitube, the intervenor, Lamson Corporation, Inc., and the Chief Procurement Officer for Construction were present and represented by counsel. The intervenor, Lamson Corporation, Inc., in addition to its Petition for Intervention in support of the Decision of the Chief Procurement Officer for Construction, has also filed a Petition for Award of Contract. Section 11-35-1520(10) requires that a contract shall be awarded to the lowest responsive and responsible Bidder whose Bid meets the requirements and criteria set forth in the Invitation for Bids unless there is reason to reject one or all Bids. The question of a failure to submit an Affidavit goes to the issue of responsiveness of a Bid. That is the only issue which will be determined by this Panel. The issue as to responsibility must be determined by the Owner, the Medical University of South Carolina, upon its review of the individual qualifications of each Bidder. Therefore, the Panel will not consider the intervenor's Petition for Award of Contract.

The facts, as presented to the Panel, were that MCC Powers-Transitube failed to receive contract addenda No. 8, No. 9, and No. 10 four (4) days prior to Bid opening as required under the Invitation for Bids. The architect for the project contacted MCC Powers-Transitube concerning these addenda. The representative for MCC Powers-Transitube flew from Charlotte, North Carolina to Charleston and, with the assistance of an agent of the architect, took his Bid apart in order to insert information required by the contract addenda. At time of submission, the Bid was opened and found to lack the Affidavit of Non-Collusion required of all contractors submitting Bids. MCC Powers-Transitube's Bid was rejected following the examination of its Bidder's Qualification envelope which also failed to contain the Affidavit. The representative of MCC Powers-Transitube, Mr. Jasper Gray, Branch Manager, then picked up his Bid and left the room. After locating the Affidavit in his hotel room, Mr. Gray returned to the Bid opening. Mr. Gray testified that he received the impression that the MCC Powers-Transitube Bid would not be accepted. The Protestant's agent and representative was in sole custody of the Bid.

The Protestant, MCC Powers-Transitube, has, in its Appeal and Request for Review, petitioned the Panel to either consider the Bid of MCC Powers-Transitube or, in the alternative, that the Pneumatic Contract be rebid. Regulation 19-445.2065, Subsection A and Subsection B, govern the criteria or circumstances under which Invitations for Bids may be cancelled after opening and contracts rebid. None of these criteria as set out are before the Panel. Therefore, the Panel shall not at this time rule that this contract should be rebid. That question is remanded to the Owner for the Owner's determination.

As to the Petition of MCC Powers-Transitube that its Bid be considered for tabulation and evaluation in the above-cited contract, it is the determination of this Panel that under the circumstances of this case, no Bid in fact exists for consideratio

The Bidder, upon rejection, took its Bid and left the room. No request was made at the time of rejection that the contracting officer hold the Bid of MCC Powers-Transitube so as to preserve the integrity of that Bid. Therefore, it is the decision of this Panel that this Bid of the Protestant may not be considered for the award of the contract before us.

CONCLUSIONS OF LAW

I hereby find as a matter of law that:

1. A failure to submit a rejected Bid for retention by the contracting officer requires rejection of that Bid, irrespective of the facts and circumstances surrounding the failure where the Bidder has retrieved his Bid and exited the room where Bids are being received.

2. That the South Carolina Procurement Code Regulation 19-445.2065, Subsections A and B, define the criteria necessary for the rejection of all Bids prior to rebidding a contract and that there is before this Panel insufficient data to suggest that a rebid of the contract is required. This is a question for the Owner and, as such, is remanded to the Medical University of South Carolina.

3. The issue of the responsibility of an apparent low Bidder is for the decision of the Owner, the Medical University of South Carolina, and the Petition for Award of Contract cannot be considered by the Panel at this time.

IT IS SO ORDERED.

SOUTH CAROLINA PROCUREMENT REVIEW PANEL

SENATOR HUGH K. LEATHERMAN, CHAIRMAN

April 12, 1982.

STATE OF SOUTH CAROLINA	)	BEFORE THE SOUTH CAROLINA PROCUREMENT REVIEW PANEL
	)	
COUNTY OF RICHLAND	)	CASE NO. 1983-4
IN RE:	)	
	)	
PROTEST BY BROWN AND MARTIN CO., INC.	)	O R D E R
	)	

This matter is before the South Carolina Procurement Review Panel (hereinafter "Review Panel") for administrative review pursuant to Section 11-35-4210(5) and Section 11-35-4410(5), South Carolina Code of Laws (1976), as amended, as a result of a Determination issued by the Chief Procurement Officer for Construction and a Request for Review of that Determination.

FINDINGS OF FACT

On or about April 26, 1983, Sumter Area Technical College received Bids for the construction of a Wastewater Treatment Plant Operator Training Facility. The apparent low bidder was the Protestant, Brown and Martin Co., Inc. of Sumter, South Carolina. On the bid form, however, the Protestant, Brown and Martin Co., Inc., listed only three (3) subcontractors. Those three (3) subcontractors were for the electrical work, the plumbing work, and for the heating, ventilating and air conditioning work. The Protestant's bid was $329,888.00.

Section 11-35-3020(2)(b)(i) of the Code of Laws of South

Carolina (1976) requires every contractor bidding on a State construction contract to list subcontractors whose dollar bid amount exceeds 2 1/2% of the total bid being submitted where the general contractor's bid is $3,000,000.00 or less. On May 10, 1983, the Chief Procurement Officer for Construction issued a Decision finding that the bid submitted by Brown and Martin Co., Inc. was unresponsive due to its failure to comply with Section 11-35-3020(2)(b)(ii) of the South Carolina Code. By letter dated May 20, 1983, legal counsel for the Protestant, Brown and Martin Co., Inc., filed a written Request for Administrative Review with the Procurement Review Panel. At the hearing, all parties were present, including the contracting authority and the second low bidder. All parties were represented by counsel.

The Protestant, Brown and Martin Co., Inc., has alleged and argued that the Determination of the Chief Procurement Officer for Construction which ruled its bid unresponsive is incorrect on the ground that an inadvertent failure to list all subcontractors is not such a material deviation as to require that the prime contractor's bid be declared unresponsive. The Protestant additionally alleged that the requirement of subcontractor listing was ambiguous. The Protestant also asserted that the requirements of Federal Law override the provisions of Section 11-35-3020(2)(b)(i-ii) of the South Carolina Code.

The President of the Protestant corporation, Mr. Pringle Boyle, testified that he had not been aware of the Procurement Code requirement for subcontractor listing. Mr. Boyle further testified that Charles Holladay, the Secretary of the corporation, had prepared

the bid and had inadvertently omitted listing the roofing subcontractor, among others. There was further testimony that the roofing contractor was in fact H. L. Gainey Roofing Company and that the amount of the roofing subcontract was $25,233.00. Mr. Boyle stated also that if his bid was found to be responsive that the H. L. Gainey Roofing Company would do the roofing work under the subcontract bid price quoted.

The project architect, Charles McCreight of the firm Demosthenes, McCreight & Riley in Sumter, South Carolina, testified on behalf of the contract awarding authority, Sumter Area Technical College. It was Mr. McCreight's testimony that it was apparent at the bid opening on April 26, 1983, that the Protestant, Brown and Martin Co., Inc., had failed to comply with the subcontractor listing requirements of the Bid Documents and the South Carolina Code. Mr. McCreight further testified that immediately following the bid opening Mr. Sam Harper of the State Engineer's Office had asked that he telephone the Protestant for an explanation concerning the failure to list the roofing subcontractor. As a result of Mr. Harper's request, Mr. McCreight then phoned Mr. Charles Holladay, the Secretary of the Protestant's corporation, and Mr. Holladay informed Mr. McCreight that he had read the requirements contained in the Bid Documents pertaining to subcontractor listing whose dollar bid amounts exceeded 2.5% of the total bid, but that he did not understand the requirement and did not feel it important. Additionally, Mr. McCreight testified that he had asked Mr. Holladay for the roofing price and that Mr. Holladay had quoted a sum of $25,233.00. Also, Mr. McCreight stated that he asked Mr. Holladay for the sub-

contract amount of the structural steel being utilized in the project and that Mr. Holladay stated that this sum was $14,415.00. Mr. McCreight testified that the amount of each of these subcontracts exceeds the 2.5% statutory listing requirement or $8,247.00 in this case. Mr. McCreight testified that he met with Charles Holladay on Wednesday, April 27, 1983, at approximately 11:20 a.m., and that Mr. Holladay reiterated that he had not felt that it was important to list subcontractors. Mr. McCreight testified that Mr. Holladay stated that the omission was his fault and that Mr. Holladay realized that he should have listed all subcontractors whose bids exceeded 2.5% of the Protestant's bid. When questioned on the Bid Documents, the architect, Mr. McCreight, testified that in his opinion the Bid Documents were not ambiguous.

Mr. Thomas E. Morgan, Director of Construction Grants Administration Section of the South Carolina Department of Health and Environmental Control, testified that it was his function to review Bid Documents in connection with federally funded projects, such as the project in issue, to determine that those Bid Documents comply with all federal regulations. This responsibility has been delegated to the State by the federal government. Mr. Morgan testified that he had reviewed and approved the subject Bid Documents prior to their use in connection with this project. Testimony was further received that the Bid Documents were not in conflict with federal regulations and it was noted that federal regulations generally provide that a bid may not be rendered unresponsive for failure to list subcontractors. However, federal regulation provides that this is not the case if State law requires such a listing. Mr.

Morgan stated that State law did require the listing of subcontractors and that it was clearly stated in the Advertisement for Bids that a failure to list subcontractors would render the bid of the prime contractor unresponsive.

The Protestant, Brown and Martin Co., Inc., submitted a base bid in the amount of $329,888.00 which was received by Sumter Area Technical College on April 26, 1983, for the construction of the cited project. Testimony demonstrates that the Protestant, Brown and Martin Co., Inc., failed to list its subcontractors as required by the Bid Documents and by State law. The President of Brown and Martin Co., Inc. testified that it had in fact a subcontractor for the roofing portion of the construction, the H. L. Gainey Roofing Company from Sumter, South Carolina, and that the subcontract amount was $25,233.00, an amount in excess of 2 1/2% of the Protestant's bid.

The Advertisement for Bids on the Wastewater Treatment Plant Operator Training Facility for Sumter Area Technical College, at Page 00001-3, contained the following provision relating to subcontractor listing:

> "(i) Any bidder or offerer in response to an invitation for bids shall set forth in his bid or offer the name and the location of the place of business of each subcontractor who will perform work or render service to the prime contractor to or about the construction, and who will specifically fabricate and/or install a portion of the work in an amount that exceeds the following percentages:
>
> Prime contractor's total bid up to three million dollars - two and one-half percent (2 1/2%).
> Prime contractor's total bid is three million dollars - two percent (2%).
> Prime contractor's total bid is over five million dollars - one and one-half percent (1 1/2%).

(ii) Failure to list subcontractors in accordance with this section and any regulation which may be promulgated by the board shall render the prime contractor's bid unresponsive.

(iii) No prime contractor whose bid is accepted shall substitute any person as subcontractor in place of the subcontractor listed in the original bid, except with the consent of the awarding authority, for good cause shown."

The bid form itself utilized by each contractor bidding on the job contained the following provisions concerning subcontractor listing:

> The undersigned bidder is aware that the South Carolina Consolidated Procurement Code requires that "Any bidder or offeror in response to an invitation for bids shall set forth in his bid or offer the name and the location of the place of business of each subcontractor who will perform work or render service to the prime contractor to or about the construction, and who will specifically fabricate and install a portion of the work in an amount that exceeds the following percentages:
>
> Prime contractor's total bid up to three million dollars.....2-1/2%
>
> Prime contractor's total bid is three million to five million dollars.....2%
>
> Prime contractor's total bid is over five million dollars.....1-1/2%"
>
> Classes of work not listed hereinbelow will be performed by the general (prime) contractor himself, or by subcontractors whose aggregate prices do not exceed the percentages of the prime contractor's bid set forth in the Code.
>
> The following subcontractors are listed pursuant to the requirements of the Code:

Subcontractor/ Supplier for:	Name, Address and Contractor's License No.
1._____	_____
2._____	_____
3._____	_____
4._____	_____
5._____	_____

Section 4.1.8 of the Instructions to Bidders (Supplement) also provided that the bid include a list of subcontractors whose prices exceeded 2 1/2% of the prime contractor's bid.

The South Carolina Code requires, under Section 11-35-3020 (2)(b)(i), that all Invitations for Bids must set forth the requirement that any bidder must set forth in his bid the name and location of the place of business of each subcontractor who will perform work or render service to the prime contractor to or about construction and who will specifically fabricate and install a portion of the work in an amount exceeding 2 1/2% of the prime contractor's total bid up to three million dollars. This provision was complied with by the contracting authority. Section 11-35-3020(2)(b)(ii) states that a failure to list subcontractors in accordance with this Section shall render the prime contractor's bid unresponsive. The testimony clearly reveals that the Protestant, Brown and Martin Co., Inc., failed to list its roofing subcontractor, H. L. Gainey Roofing Company of Sumter, South Carolina. There was further testimony by the Director of Construction Grants Administration Section of the South Carolina Department of Health and Environmental Control that the Bid Documents are not in conflict with federal regulations. Assuming 40 C.F.R. Section 35-938-4(h)(6) applies to this procurement, the Advertisement for Bids unambiguously stated that failure to list the required subcontractors would render the bid unresponsive.

The Protestant's bid has been declared unresponsive by Section 11-35-3020(2)(b)(ii) of the South Carolina Code. Protestant may not cure such deficiency after bid opening. State Budget and Control Board Regulation 19-445.2080 provides for correction of

minor or immaterial variations from the exact requirements of the Invitation for Bids where certain conditions are met. However, the South Carolina Legislature, in Section 11-35-1410(7) of the South Carolina Code, has defined a "responsive bidder" as a person who has submitted a bid which conforms in all material aspects to the Invitation for Bids. By declaring a bid which fails to list required subcontractors unresponsive in Section 11-35-3020(2)(b)(ii), the Legislature has made it clear that failure to list those subcontractors is a material variance from the requirements of South Carolina law. Since only immaterial variations may be cured, Protestant may not now alter its bid.

Therefore, it is the finding of the Procurement Review Panel that the omission of a subcontractor required to be listed under Section 11-35-3020(2)(b)(i) is a material deviation from the requirements of the Invitation to Bid and renders the bid of the Protestant, Brown and Martin Co., Inc., unresponsive as required under Section 11-35-3020(2)(b)(ii).

CONCLUSIONS OF LAW

1. Under the requirements of Section 11-35-3020(2)(b)(ii), a failure to list subcontractors in accordance with the requirements of the South Carolina Consolidated Procurement Code, Section 11-35-3020(2)(b)(i), shall render the prime contractor's bid unresponsive.

2. Under the requirements of the Advertisement for Bids and the bid form itself, a bidder is required to list all subcontractors who will perform work or render service to the prime contractor to or about construction and who will specifically fabricate and install

a portion of the work in an amount that exceeds 2 1/2% of the prime contractor's total bid up to three million dollars.

3. The Advertisement for Bids states that a failure to list subcontractors will render the bid of the prime contractor unresponsive.

4. Federal regulation does not prohibit declaring a bid unresponsive for a failure to list subcontractors when a subcontractor listing is adopted pursuant to State law.

5. Section 11-35-40(3) of the South Carolina Consolidated Procurement Code states:

> (3) Compliance with Federal Requirements. Where a procurement involves the expenditure of federal assistance or contract funds, the governmental body shall also comply with such federal law and authorized regulations as are mandatorily applicable and which are not presently reflected in the code. Notwithstanding, where federal assistance or contract funds are used in a procurement by a governmental body as defined in Section 11-35-310(18), requirements that are more restrictive than federal requirements shall be followed.

6. Under the case as presented, the bid of the Protestant, Brown and Martin Co., Inc., must be declared unresponsive as a matter of law.

It is the Decision of the Procurement Review Panel that the failure, whether inadvertent or otherwise, to list a subcontractor as required by law under the South Carolina Consolidated Procurement Code may not be subject to waiver or correction and that a finding that such a bid is unresponsive is mandatory under South Carolina law.

IT IS SO ORDERED.

SOUTH CAROLINA PROCUREMENT REVIEW PANEL

SENATOR HUGH K. LEATHERMAN, CHAIRMAN

June 28th, 1983.

STATE OF SOUTH CAROLINA	)	BEFORE THE SOUTH CAROLINA
	)	PROCUREMENT REVIEW PANEL
COUNTY OF RICHLAND	)	CASE NO. 1983-5

IN RE:	)	
	)	
PROTEST BY GENERAL SALES COMPANY INC.	)	O R D E R
	)	

This matter is before the South Carolina Procurement Review Panel (hereinafter "Review Panel") for administrative review pursuant to Section 11-35-4210(5) and Section 11-35-4410(5), South Carolina Code of Laws (1976), as amended, as a result of a Determination issued by the Acting Materials Management Officer and a Request for Review of that Determination.

FINDINGS OF FACT

On or about February 4, 1983, the Medical University of South Carolina received bids for the purchase of "The Hobart No. 1712-R Meat Slicer or an acceptable equal". The specifications listed ten criteria or product requirements transposed directly from the specifications published by the Hobart Corporation for the No. 1712-R Slicer.

Bids were received from six bidders with two bidders submitting bids on the Hobart and on alternate products. The Protestant, General Sales Company, Inc., submitted a bid on the Hobart No. 1712-R Meat Slicer for $2,375.00, on the Fleetwood No. 6125

for $1,675.00 as Alternate No. 1, and on the Universal No. 8512 for $1,495.00. The low bidder on the Hobart No. 1712-R Meat Slicer was Florence Restaurant Supply, Inc. with a bid of $2,325.00.

The Medical University of South Carolina Procurement Officer determined that the Fleetwood No. 6125 and other alternates bid were not acceptable and not equal in quality, durability, and performance.

By letter dated May 6, 1983, the Protestant, General Sales Company, Inc., filed a Protest with the Acting Materials Management Officer alleging the use of (1) closed specifications, (2) biased information, and (3) lack of compliance with the requirements of the South Carolina Consolidated Procurement Code. A hearing was held on May 18, 1983, by the Acting Materials Management Officer and a Decision, dated May 26, 1983, was issued denying the Protest filed by General Sales Company, Inc., and finding that the specifications in issue were not unduly restrictive, that the rejection of the alternates was based on a consideration of ownership and operation, and that the applicable provisions of the South Carolina Consolidated Procurement Code and pertinent Regulations had been complied with.

A Request for Administrative Review was received by the Materials Management Office and was forwarded for filing with the Procurement Review Panel. By consent and Notice, the Administrative Review of the Decision issued by the Acting Materials Management Officer was held on June 29, 1983.

Senator Setzler disclosed to all parties that he had associated Protestant's legal counsel in an entirely unrelated matter and the Panel Chairman, Senator Leatherman, disclosed that he

had retained the Respondent's legal counsel on an entirely unrelated matter. No objections were made, and no motions for recusal were entered.

Section 11-35-1520(1), South Carolina Code of Laws (1976), as amended, requires that contracts of $2,500.00 or more must be awarded by competitive sealed bidding. This contract was not required to be competitively bid. However, if the requirements of the Consolidated Procurement Code are voluntarily assumed, those requirements must be complied with.

The Invitation for Bids must include the specifications for the product sought and all contractual terms and conditions applicable to the procurement, Section 11-35-1520(2), South Carolina Code of Laws (1976), as amended. Only the evaluation criteria set forth in the Invitation for Bids may be used in the evaluation of the bid, Section 11-35-1520(7), South Carolina Code of Laws (1976), as amended. The contract is required to be awarded to the lowest responsible and responsive bidder whose bid meets the requirements and criteria set forth in the Invitation for Bids, Section 11-35-1520(10), South Carolina Code of Laws (1976), as amended.

The term "specifications" is defined under South Carolina Consolidated Procurement Code Regulation 19-445.2140(4) as follows:

> Specification means any description of the physical, functional, or performance characteristics, or of the nature of a supply, service, or construction item. A specification includes, as appropriate, requirements for inspecting, testing, or preparing a supply, service or construction item for delivery. Unless the context requires otherwise, the terms "specification" and "purchase description" are used interchangeably throughout the Regulations.

The purpose of specifications is to serve as the basis for procuring

a product or service which is both adequate and suitable for the State's needs in a cost effective manner taking into account:

(1) Initial acquisition costs;

(2) The cost of ownership; and

(3) The cost of operation.

Specifications must clearly describe the State's requirements without being restrictive in nature. South Carolina Procurement Code Regulation 19-445.2140, Subsection B.

Sole Source Procurement is when there is only one source for the required product, Section 11-35-1560. South Carolina Procurement Code Regulation 19-445.2015, Subsection B, states that Sole Source Procurement is not permissible unless there is only one single supplier for the item or service sought. Since there are many suppliers for the Hobart Meat Slicer No. 1712-R, this obviously was not a Sole Source Procurement item.

The question was also raised during the hearing as to whether or not the specifications in question were Functional Specifications or Technical Specifications. Regulation 19-445.2140 (C) defines Functional or Performance Specifications as emphasizing functional or performance criteria while limiting the design or other detailed physical descriptions to those necessary to meet the needs of the State. Using agencies are required to attempt to include the principal functional performance needs to be met by the product or service sought. A Functional or Performance Specification requires a bidder to furnish an item that will perform a specific task rather than a carefully described item. A Functional or Performance Specification would describe pieces per hour, inches per minute, or some

other measurable output, and should set out the desired operating parameters, as well as weight limitations or dimensions if these are necessary. The Functional or Performance Specification describes the functions to be achieved by a product and the end result is the priority consideration.

A Technical Specification sets out the special needs of the purchaser. Technical Specifications state the specific tolerances, necessary dimensions, and any other information identifying critical performance characteristics and produce requirements with preciseness and accuracy.

A Design Specification is a detailed specification which sets out the requirements of the item to be purchased by detailing the characteristics that the product must possess. The specification is so detailed that it describes how the product is to be manufactured and is most commonly used in construction of buildings, highways, and structures of all kinds.

A Proprietary Specification is a specification analagous to the Brand-Name Specification. The criteria listed in such a specification can only be satisfied by one specific product. South Carolina Procurement Code Regulation 19-445.2140, Subsection A, Item 1, defines a Brand-Name Specification as meaning a specification limited to one or more items by manufacturers' names or catalogue number.

A "Brand-Name or Equal" Specification is a specification which uses one or more manufacturers' names or catalogue numbers to describe the standard of quality, performance, and other characteristics needed to meet the State's requirements and which provides for

the submission of equivalent products, South Carolina Procurement Code Regulation 19-445.2140, Subsection A, Item 2.

Specifications are clear and accurate detailed descriptions of the technical requirements for the purchase of supplies, equipment or services. Specifications define the minimum requirements for the quality and construction of a desired product. The specification before the Panel is a "Brand-Name or Equal" Specification. The technical requirements found in the specification were directly transposed from the manufacturer's product literature. The evidence before the Panel demonstrates that the product description was utilized in a restrictive manner. The bid of the Protestant appears, from the evidence on the record, to have been rejected due to minor differences in design, construction, and features which do not affect the suitability of the product for its intended use. "Brand-Name or Equal" Specifications should set out all known acceptable brand name products. The specification before the Panel did not list any other brand names. Where a purchase description is used, bidders must be given the opportunity to offer products other than those specifically referenced if those other products will meet the needs of the State in essentially the same manner as those referenced. It should always be clear that a "Brand-Name or Equal" description is intended to be descriptive not restrictive and is merely to indicate the quality and characteristics of the product that will be satisfactory and acceptable. Products offered as equal must, of course, meet fully the salient characteristics and product requirements listed in the Invitation for Bids.

In the case before the Panel, the alternate product, the

Fleetwood Model No. 6125, appears to be substantially similar and equivalent to the Hobart Model No. 1712-R Meat Slicer in characteristics and standards of quality.

Therefore, it is the finding of the Procurement Review Panel that while the specification in issue was not unduly restrictive, and biased information was not relied on in the award of the contract, the transposition of the exact characteristics of the Hobart Model No. 1712-R to the specifications in the Bid Invitation and the subsequent utilization of those absolute criteria in evaluating the alternate bid on the Fleetwood Model No. 6125 Slicer was restrictive and in violation of South Carolina Procurement Code Regulation 19-445.2140, Subsection B, in application.

CONCLUSIONS OF LAW

1. Under South Carolina Procurement Code Regulation 19-445.2140, the "Brand-Name or Equal" Specification before the Panel was not unduly restrictive.

2. That biased information was not utilized in making the product determination.

3. That the application of the criteria listed in the specification denominated as "Brand-Name or Equal" was violative of the intent of the South Carolina Consolidated Procurement Code and pertinent Regulation in that the Medical University of South Carolina did not use these specifications as establishing a trade-known range of quality, but rather applied those criteria strictly to secure a specific article.

It is the Decision of the Procurement Review Panel that the Protestant should have been awarded the contract under the

solicitation. The Protestant is ordered to submit an affidavit setting out those costs incurred in the preparation of its bid.

IT IS SO ORDERED.

SOUTH CAROLINA PROCUREMENT
REVIEW PANEL

SENATOR HUGH K. LEATHERMAN,
CHAIRMAN

July 21, 1983.

STATE OF SOUTH CAROLINA	)	BEFORE THE SOUTH CAROLINA
	)	PROCUREMENT REVIEW PANEL
COUNTY OF RICHLAND	)	CASE NO. 1983-6

IN RE:	)	
	)	
PROTEST BY JOHNSON CONTROLS	)	O R D E R
	)	

It appears that certain issues in the above matter, both factual and legal, have not been fully resolved by determination of the Chief Procurement Officer for Construction, and that the protests of Johnson Controls and other intervenors are not ripe for consideration by the Procurement Review Panel; there being no objection by counsel for the parties, this matter is remanded to the Chief Procurement Officer for Construction for his consideration and decision as provided by the South Carolina Consolidated Procurement Code, Section 11-35-4210.

The Chief Procurement Officer for Construction shall consider the protests filed by Johnson Controls and Computer Controls Corporation, and the request for substitution of subcontractors by Freeman Mechanical, Inc., as well as the positions of the Medical University of South Carolina and other parties who may have standing to intervene in the proceedings.

The decision of the Chief Procurement Officer for Construction is subject to review by this Panel pursuant to Sections 11-35-4210(5) and 11-35-4410.

So Ordered.

s/Hugh K. Leatherman
Hugh K. Leatherman, Sr.
Chairman

July 28, 1983

STATE OF SOUTH CAROLINA	)	BEFORE THE SOUTH CAROLINA
	)	PROCUREMENT REVIEW PANEL
COUNTY OF RICHLAND	)	CASE NO. 1983-7

IN RE:	)	
	)	
PROTEST BY STANDARD CONSTRUCTION COMPANY, INC.	)	O R D E R

This matter is before the South Carolina Procurement Review Panel (hereinafter "Review Panel") for administrative review pursuant to Section 11-35-4210(5) and Section 11-35-4410(5), South Carolina Code of Laws (1976), as amended, as a result of a Determination issued by the Chief Procurement Officer for Construction and a Request for the administrative review of that Determination.

FINDINGS OF FACT

On May 19, 1983, bids were received by the South Carolina Criminal Justice Academy for the construction of a Maintenance Support Facility, State Project No. 8091-N20-016. The apparent low bidder was Standard Construction Company, Inc., of Columbia, South Carolina. The apparent low bidder did

not list the manufacturer of the pre-engineered steel building which was to be provided under the contract in its bid form. The second apparent low bidder, Grunsky Construction Company, Inc., of Columbia, South Carolina, protested the bid on the ground that Standard's bid had not listed the supplier of this pre-engineered metal building and that this was a failure to comply with the Instructions to Bidders, thereby requiring the rejection of that bid.

The State Chief Procurement Officer for Construction in a decision dated June 14, 1983, determined that the bid submitted by Standard Construction Company, Inc., was unresponsive due to a failure by Standard to list the supplier of the pre-engineered metal building. The Chief Procurement Officer so advised all concerned parties by letter dated June 14, 1983, and further confirmed that decision by letter dated July 21, 1983. Standard Construction Company, Inc., timely filed a protest of that decision as was stipulated by all parties present at the hearing. The protest was heard by this Panel on July 28, 1983.

The Instructions to Bidders purports to set forth the requirements of Section 11-35-3020(2)(b)(i)

of the South Carolina Consolidated Procurement Code in two separate places. The Supplemental Instructions to Bidders state that the bidder must list subcontractors who "specifically fabricate and/or install a portion of the work ...." However, the bid form proposal, also contained in the Instructions to Bidders, states that the bidder must only list subcontractors who "specifically fabricate and install a portion of the work." Five of the ten bidders on the project similarly did not list the manufacturer of the steel building.

As the evidence and testimony before the Panel indicate, the supplier intended to be used by Standard Construction Company, Inc., is Inryco, Inc., a subsidiary of Inland Steel. No question was raised by the State Engineer or any other party as to the capability of Inryco to provide the specified building.

Under the facts presented by the present case, the Panel finds that the Instructions to Bidders were ambiguous. If Suppliers were also to be listed, then that requirement should have been clearly and specifically set out. If a failure to list suppliers was to render a bid unresponsive, then that language should have been definitely set forth in the Instructions to Bidders. The bid of the

Protestant may not be held unresponsive under the present facts for failing to list a supplier.

CONCLUSIONS OF LAW

1. The Instructions to Bidders and related bid documents were ambiguous in that Section 11-35-3020(2)(b)(i) of the South Carolina Consolidated Procurement Code was incorrectly quoted in one place and correctly quoted in another, leading to confusion as to whether the name of the supplier of the pre-engineered metal building must be listed in the bid.

2. As the Instructions to Bidders purports to quote the South Carolina Consolidated Procurement Code in two separate places, it would be inappropriate here to expand the listing requirement of the bidders. If listing requirements more stringent than the Code are required, this should be clearly stated in the Bid Documents.

3. As the Instructions to Bidders brought before the Panel in the present case are ambiguous, the bid of Standard Construction Company, Inc., may not be rejected as unresponsive.

It is the decision of the South Carolina Procurement Review Panel that the bid of Standard Construction

Company, Inc., shall be reinstated and tabulated for consideration of the award of the contract on the above cited State project.

IT IS SO ORDERED.

SOUTH CAROLINA PROCUREMENT
REVIEW PANEL

Hugh K. Leatherman

SENATOR HUGH K. LEATHERMAN,
CHAIRMAN

August 9th, 1983.

STATE OF SOUTH CAROLINA	)	BEFORE THE SOUTH CAROLINA
	)	PROCUREMENT REVIEW PANEL
COUNTY OF RICHLAND	)	CASE NO. 1983-10

IN RE:	)	
	)	
PROTEST BY J. A. METZE & SONS, INC. and MARTIN ENGINEERING, INC.	)	O R D E R

This matter is before the South Carolina Procurement Review Panel (hereinafter "Review Panel") for Administrative Review pursuant to Section 11-35-4210(5) and Section 11-35-4410(6), South Carolina Code of Laws (1976), as amended, as a result of a Determination issued by the Chief Procurement Officer for Construction and a Request for Review of that Determination.

FINDINGS OF FACT

On July 6, 1983, Bids were solicited for the construction of the South Carolina Vocational Rehabilitation Office Building in West Columbia, South Carolina, State Project No. 8011-H73-014. Bids were received and subsequently opened on August 9, 1983, as indicated in the Advertisement. By letter dated August 18, 1983, Mr. James B. Metze, President of J. A. Metze & Sons, Inc., filed, as required by the South Carolina Consolidated Procurement Code, Section 11-35-4210(1) South Carolina Code of Laws (1976), as amended, a Protest with the Chief Procurement Officer for Construction objecting to the consideration of the Bid submitted by Martin Engineering, Inc. for the award

of the contract in issue on the ground that Martin Engineering, Inc. failed to designate its subcontractors as required by State law and the Bid Documents.

A hearing was held by the Chief Procurement Officer for Construction pursuant to his authority under Section 11-35-4210, South Carolina Code of Laws (1976), as amended, on September 2, 1983, on the issue of the responsiveness of the Bid submitted by Martin Engineering, Inc. in respect to the requirements of Section 11-35-3020 (2)(b) (i) and Section 11-35-3020(2)(b)(ii).

By Mailgram dated September 6, 1983, Martin Engineering, Inc. "lodged" a Protest of award of the construction contract to any other contractor with the Chairman of the Procurement Review Panel alleging Martin Engineering, Inc. to be the lowest responsive and responsible bidder and further alleging the bid of J. A. Metze & Sons, Inc. to be non-responsive due to an alleged failure to list a masonry subcontractor. There was no testimony as to any similar Mailgram being sent to the Chief Procurement Officer for Construction.

On September 12, 1983, the Chief Procurement Officer for Construction issued a Decision declaring the Bid submitted by Martin Engineering, Inc. non-responsive due to the failure to list the fabricator or supplier of the structural steel and the millwork required for the project.

On September 13, 1983, legal counsel for Martin Engineering, Inc. filed with the Chairman of the Procurement Review Panel a Request for Review of the September 12, 1983, Decision of the Chief Procurement

Officer for Construction pursuant to Section 11-35-4410(5) and Section 11-35-4410(6), South Carolina Code of Laws (1976), as amended. The Request for Review was premised on the ground that the Decision violated Section 11-35-3020 of the South Carolina Code.

An Administrative Review was conducted pursuant to Notice to all parties on September 23, 1983. Martin Engineering, Inc., J. A. Metze & Sons, Inc., and the South Carolina Division of General Services were present and represented by legal counsel. It was agreed by the parties that the Record for the purpose of the Administrative Review would consist of "the Appendix to Brief on Behalf of Martin Engineering, Inc." with the exception of Item F of the Appendix, the Project Manual, and the testimony received by the Panel.

The moving party did not adequately show whether or not its Protest of the consideration of the Bid of J. A. Metze & Sons, Inc., due to a failure to list a masonry subcontractor, had been timely or correctly filed or even considered by the Chief Procurement Officer for Construction at the hearing resulting in the Decision upon which Administrative Review was requested. Accordingly, the South Carolina Procurement Review Panel determined that the responsiveness of the Bid submitted by J. A. Metze & Sons, Inc. was not properly before it for consideration. Additionally, according to statements by legal counsel for Martin Engineering, Inc., any Protest concerning the responsiveness of the Bid submitted by J. A. Metze & Sons, Inc. was filed with the Chief Procurement Officer for Construction subsequent to the issuance of the Decision appealed from.

The President of Martin Engineering, Inc., James Martin, testified under oath that the steel company utilized would only be

fabricating the steel and not installing the steel on the project. This was apparently also to be the case with the millwork. Testimony was also given by Mr. Martin that had he understood that the requirement for subcontractor "listing" also included the listing of fabricators or suppliers whose prices exceeded the statutory percentages, he would have so listed those "subcontractors".

The Advertisement for the construction of the South Carolina Vocational Rehabilitation Office Building clearly directs the contractor's attention to Section 11-35-3020(2)(b) of the Code of Laws of South Carolina (1976), as amended, pertaining to the mandatory listing of proposed subcontractors in the Bid as detailed in the Bid Documents. It is stated that a failure to list subcontractors in accordance with this Section shall render the contractor's Bid unresponsive.

The form of proposal quotes Section 11-35-3020(2)(b)(i) verbatim. See Tab E of "Appendix". Legal counsel for Martin Engineering, Inc. argues that the definition of subcontractor in the Bid Documents and the Project Manual differs from that in the Procurement Code at Section 11-35-3020(2)(b)(i), thereby rendering the Instructions to Bidders ambiguous and unenforceable.

There has in the past been confusion on the part of contractors concerning what is required in respect to the listing of subcontractors required in order to comply with the statutory subcontractor listing requirements under Sections 11-35-3020(2)(b)(i) and 11-35-3020(2)(b)(ii).

The South Carolina Consolidated Procurement Code, at Section 11-35-310(27), South Carolina Code of Laws (1976), as amended, defines

a "subcontractor" as follows:

> "Subcontractor" means any person having a contract to perform a particular service for a contractor as a part of the contractor's agreement with a governmental body.

Section 11-35-3020(2)(b)(i) requires:

> (i) Any bidder or offeror in response to an invitation for bids shall set forth in his bid or offer the name and the location of the place of business of each subcontractor who will perform work or render service to the prime contractor to or about the construction, and who will specifically fabricate and install a portion of the work in an amount that exceeds the following percentages:
>
> Prime contractor's total bid up to three million dollars..... 2 1/2%
>
> Prime contractor's total bid is three million to five million dollars..... 2%
>
> Prime contractor's total bid is over five million dollars..... 1 1/2%

Section 11-35-3020(2)(b)(ii) requires:

> (ii) Failure to list subcontractors in accordance with this section and any regulation which may be promulgated by the board shall render the prime contractor's bid unresponsive.

In order to clarify and to inform the contractor as to precisely what listing was being sought in order to comply with the cited Sections, on Page 1 of 2 of the Project Manual, SUPPLEMENT TO INSTRUCTIONS TO BIDDERS, AIA DOCUMENT A701 (May, 1978 Edition) 10-16-81 at ARTICLE 9, Paragraph 4.1.8, the following was stated:

> "Each copy of the bid shall include a list of subcontractors whose prices exceed the following percentages of the prime contractor's total bid:
>
> Up to $3,000,000..... 2 1/2%
>
> From $3,000,000 to $5,000,000..... 2%
>
> Over $5,000,000..... 1 1/2%

The term 'subcontractor' is deemed to mean:

a) Those who perform work or render services to the prime contractor to or about the construction,

b) Those who supply and/or install materials fabricated to a special design, and

c) Those who supply and/or install equipment fabricated to a special design."

It is the Decision of the Panel that the Bid Documents are not ambiguous in regard to the requirement of subcontractor listing and that the "Instructions to Bidders" does not conflict with the statutory language of the Code.

Legal counsel for Martin Engineering, Inc. argued that the Procurement Code only required the listing of subcontractors who "performed work" or "rendered service" to the contractor conjunctively with "fabricating" and "installing" a portion of the work, the value of which exceeds the statutory amounts set under the Code. This interpretation would render the purpose of these Sections meaningless. The legislative purpose underlying the requirement for the listing of "subcontractors" was to inhibit and prevent the common practice of "bid shopping" whereby a contractor receives a bid from a subcontractor, uses that bid in compiling his own bid, and, upon receipt of the contract proceeds to "shop" for a better price, thereby increasing his own profit and perhaps decreasing the quality of the work supplied to the owner. The Procurement Code defines "subcontractor" as being any person having a contract to perform a particular service for a contractor as a part of that contractor's agreement with the public owner.

In view of this definition, it is the Panel's determination that Section 11-35-3020(2)(b)(i) requires the listing of all sub-

contractors, including fabricators and suppliers; and that under Section 11-35-3020(2)(b)(ii), a failure to list these subcontractors, including fabricators, suppliers, and any other entity having a contract with the contractor to furnish work, render services, fabricate, or install portions of the work in an amount exceeding the statutory percentages must render the Bid of the prime contractor unresponsive.

Alternatively and independently of the above, the Bid Documents in this matter clearly defined "subcontractor" for the purpose of this Bid. See, SUPPLEMENT TO INSTRUCTIONS TO BIDDERS, id. The definition unmistakably includes certain material suppliers and fabricators. As applied to this case, the term included Martin Engineering's steel fabricator and millwork supplier. As stated by the Chief Procurement Officer for Construction in his Decision of September 12, 1983, bidders must respond to and follow the Instructions of the Bid Documents and Project Manual. Otherwise, the Bid is not responsive to the request. The Bid Documents in this case made the requirement of listing the noted material suppliers and fabricators sufficiently clear to all prospective bidders.

It is the determination of the Panel that, based upon the testimony and the record as a matter of fact, the Decision of the Chief Procurement Officer shall be confirmed.

CONCLUSIONS OF LAW

It is the Determination of the Procurement Review Panel that the Bid Documents and Instructions to Bidders were not ambiguous nor in conflict with the requirements of the South Carolina Consolidated Procurement Code.

IT IS THEREFORE the Decision of this Panel that the Determination of the Chief Procurement Officer for Construction dated September 12, 1983, is confirmed.

IT IS SO ORDERED.

SOUTH CAROLINA PROCUREMENT
REVIEW PANEL

SENATOR HUGH K. LEATHERMAN,
CHAIRMAN

October 4, 1983.

STATE OF SOUTH CAROLINA COUNTY OF RICHLAND	IN THE COURT OF COMMON PLEAS
Martin Engineering, Inc., Plaintiff, vs. South Carolina Procurement Review Panel, South Carolina Vocational Rehabilitation Department, John A. McPherson as South Carolina Chief Procurement Officer for Construction, and J. A. Metze & Sons, Inc., Defendants.	No. 83-CP-40-4155 ORDER

This matter is before the Court on plaintiff's Motion for a Temporary and/or Permanent Injunction. The Summons and Complaint were filed and served on October 10, 1983, and the instant motion was heard on October 14, 1983. For the reasons set forth below, the Court concludes that plaintiff is not entitled to the injunctive relief it seeks.

FACTS

This case involves the procurement process in connection with the construction of the South Carolina Vocational Rehabilitation Office Building in West Columbia, South Carolina. Plaintiff Martin Engineering was originally awarded the contract when bids were opened on August 9, 1983. Subsequently, J. A. Metze & Sons, Inc., another bidder, filed a Protest with the Chief Procurement Officer for Construction, pursuant to § 11-35-4210(1). South Carolina Code of Laws of 1976, as amended. The basis for the protest was that Martin had failed to designate all of its subcontractors as required by the state law and the Bid Documents.

On September 12, 1983, the Chief Procurement Officer for Construction issued a Decision declaring the Bid submitted by Martin Engineering, Inc. non-responsive due to the failure to list the fabricator or supplier of the structural steel and the millwork required for the project. Martin appealed this decision to the Procurement Review Panel which confirmed the Chief Procurement Officer's decision in an Order of Determination dated October 4, 1983. As previously noted, Martin filed this action six days later. Martin's basic contention is that it was entitled to list only those subcontractors performing work onsite because the requirement that all subcontractors be listed was ambiguously stated and in excess of the procuring agency's statutory authority.

DISCUSSION

The Court is of the opinion that Martin has not established the prerequisites which would entitle it to an injunction in this case.

Ample authority exists for the proposition that injunctive relief is not an appropriate remedy for a disappointed bidder, at least in the absence of a clear violation of duty by governmental officials, which, as will be seen below, did not occur in this case. As the court stated in M. Steinthal & Co. v. Seamans, 455 F. 2d 1289 (D.C.Cir. 1971):

> The balancing of the public interest in free and fair competitive biding ... requires informed judgments by officials continuously faced with such decisions, not by the courts which are unfamiliar with, and ill-equipped to handle, the problems couched in the procurement policy terms.

Id. at 1304.

For those reasons and others, the court in Steinthal denied injunctive relief, leaving to the disappointed bidder an action for damages. Accord, William F. Wilke, Inc. v. Department of the Army, 357 F.Supp. 988 (D.Md. 1973), aff'd., 485 F.2d 180 (4th Cir. 1973). Among the additional reasons for denying injunctive relief cited by the above cases is the need for an orderly procurement process. This need cannot be served when contracts are delayed at the behest of disappointed bidders who seek injunctive relief in the courts. Aside from the built-in inconvenience which is caused by delay, any delay also raises the prospect that the contract would have to be rebid, at substantial cost to the procuring agency. Also, in this case, delay prolongs the time during which the agency must occupy rental space, with concomitant costs.

The need for the Court to stay its hand, which formed the basis for the Steinthal case, supra, is particularly appropriate under the South Carolina Consolidated Procurement Code. The Code, in Sections 11-35-4210 through 11-35-4410, provides for review by both the appropriate Chief Procurement Officer and the Procurement Review Panel, a process which could leave a given contract in doubt for at least 60 days.

In addition, the Court concludes that Martin's claim is substantively barred by § 11-35-3020(2)(b). The gravamen of plaintiff's complaint is that § 11-35-3020(2)(b)(i) requires bidders to list only those subcontractors who will "fabricate and install a portion of the work." However, plaintiff consistently omits reference to the initial paragraph of § 11-35-3020(2)(b), which provides that "[t]he using agency's invitation for bids shall set forth all requirements of the bid including but not limited to the

following:... ." (emphasis added). The plain meaning of the language chosen by the General Assembly indicates that the invitation for bids need not be limited to the matters enumerated, but may include such other matters as the using agency deems appropriate.

In this case, the bid documents, copying AIA Document A701, Supplement to Instructions to Bidders, defined "subcontractor" as one who, inter alia, supplies and/or installs specially fabricated equipment or materials. The "Advertisement for Construction Bids," which was a part of the bid documents, contained a similar definition. While it is true that in one place the bid documents used the limited definition which the statute at a minimum requires, the overwhelming majority of the general contractors who bid on the project did list all their subcontractors, and not merely the ones who did work on the construction site. Such being the case, it cannot be fairly said that the bid documents were ambiguous, especially when the challenged language appeared at one point in a standard AIA instruction form.

The plaintiff has sought only injunctive relief. Since the Court has concluded as a matter of law that injunctive relief is inappropriate, and that there is no legal basis for sustaining plaintiff's claim, it follows that this action should be, and hereby is, dismissed.

AND IT IS SO ORDERED.

/s/William J. Craine, Jr.
William J. Craine, Jr.
Presiding Judge, 5th Judicial Circuit

November 4, 1983

STATE OF SOUTH CAROLINA COUNTY OF RICHLAND	)	BEFORE THE SOUTH CAROLINA PROCUREMENT REVIEW PANEL CASE NO. 1983-12
IN RE: PROTEST BY AMERICAN TELEPHONE & TELEGRAPH COMPANY	)	O R D E R

This matter is before the South Carolina Procurement Review Panel (hereinafter "Panel") for administrative review pursuant to §§ 11-35-4210(5) and 11-35-4410, South Carolina Code of Laws of 1976, as amended, as a result of a Determination issued by the Information Technology Management Officer and a Request for Review of that Determination.

The threshold question before the Panel concerns the timeliness of the Protest filed by AT&T with the Information Technology Management Officer. The Panel concludes that the Protest was not timely filed and that the Information Technology Management Officer acted correctly in dismissing the Protest as untimely, and makes the following Findings of Fact and Conclusions of Law:

FINDINGS OF FACT

1. On May 9, 1983, the State of South Carolina issued a Request for Proposal ("RFP") for communications services. The RFP stated that all proposals should be received by 2:00 p.m. on July 11, 1983.

2. On May 24, 1983, AT&T submitted two sets of questions to the Materials Management Office. On May 27, the State's response was issued and sent to AT&T. The deadline for such questions was May 24, 1983.

3. On June 14, 1983, AT&T sent the Materials Management Office a letter stating that AT&T would respond by July 11, but requesting a 90-day extention of time for responses.

4. On June 17, 1983, AT&T's letter was returned by the Materials Management Office, and the request for extension was effectively denied.

5. A similar exchange of correspondence occurred by letters dated June 20, 1983, and June 21, 1983, respectively.

6. On July 8, 1983, three days before the deadline for proposals, AT&T notified the Materials Management Office that it did not intend to submit a bid or proposal.

7. On July 22, 1983, AT&T wrote the members of the Budget and Control Board, criticizing the RFP and stating that "we welcome the opportunity to work with you to develop a better overall solution to the State's telecommunications requirements."

8. On August 24, 1983, the Materials Management Office issued a "Statement of Award" stating that no award would be made and that "all otherwise acceptable proposals are at unreasonable price."

9. On September 22, 1983, AT&T filed its protest with the Information Technology Management Officer, who dismissed the protest as untimely under § 11-35-4210(1). AT&T filed its Request for Review on October 7, 1983. The hearing before the Panel, by agreement of counsel, was deferred until November 7, 1983.

CONCLUSIONS OF LAW

1. Section 11-35-4210(1), which creates the right of protest to the appropriate chief procurement officer (in this case, the Information Technology Management Officer), requires that the protest "be submitted in writing within ten days after such aggrieved persons know or should have known of the facts giving rise thereto, but in no circumstance after thirty days of notification of award of contract."

2. The Panel finds that there is no evidence in the record which suggests that AT&T did not know everything necessary to make its protest by July 11, 1983, if not earlier.

3. The letter of July 22, 1983, was not, in the opinion of the Panel, intended as a protest, nor would it be reasonable to construe it as such. By its terms, the letter is merely an offer of information and assistance and a promise of continuing availability should the State desire to initiate further contacts with AT&T.

4. The Panel finds, however, that the ten-day provision of § 11-35-4210(1), rather than the thirty-day provision, applies. Since the Panel has found that AT&T knew or should have known of the facts giving rise to its protest no later than July 11, 1983, the Panel concludes that an application of the thirty-day limitation period in this case would render the ten-day limitation meaningless. The thirty-day limitation, in the Panel's opinion, was intended to shorten the limitation periods for persons who learned of facts giving rise to a protest after the award.* It was not intended to lengthen the period for persons, such as AT&T, who knew or should have known everything necessary to file a protest well before the contract was awarded.

5. Since the ten-day limitation applies to AT&T in this case, and since AT&T did not file a protest within ten days of July 11, 1983, the Panel concludes that AT&T's protest was not timely filed and that the dismissal of the protest by the Information Technology Management Officer is confirmed.

IT IS SO ORDERED.

SOUTH CAROLINA PROCUREMENT REVIEW PANEL

SENATOR HUGH K. LEATHERMAN, Chairman

November 18, 1983

* Thus, for example, if a person learned of facts giving rise to a protest twenty-one days after the award, that person would have nine days (the remainder of the thirty-day period), rather than ten days to file his protest.

STATE OF SOUTH CAROLINA	)	BEFORE THE SOUTH CAROLINA PROCUREMENT REVIEW PANEL
	)	
COUNTY OF RICHLAND	)	CASE NO. 1983-17

IN RE:	)	
	)	
PROTEST BY STERILE SERVICES CORPORATION	)	O R D E R
	)	

This matter is before the Panel pursuant to a Request by Sterile Services Corporation for Review of the Decision of the Acting Chief Procurement Officer.

FINDINGS OF FACT

1. On July 12, 1983, the Materials Management Office issued a Request for Proposals to provide custodial services for the University of South Carolina School of Medicine.

2. Among the offerors were Oxford Building Services, which ultimately was awarded the contract, and Sterile Services Corporation, which protested the award.

3. The Acting Chief Procurement Officer denied the protest of Sterile Services by Decision dated November 11, 1983.

4. On November 23, 1983, Sterile Services filed a Request for Review of Decision. The sole grounds for this request were that Oxford's failure to supply OSHA-20 forms with its offer made the offer nonresponsive, and that the

Acting Chief Procurement Officer erred in concluding that this ground had not been timely raised in writing.

5. At the hearing, the attorney for Sterile Services stated that Sterile was waiving all of its grounds for protest except the two set forth in Paragraph 4 above.

CONCLUSIONS OF LAW

1. Section 11-35-4210(1) provides that "[t]he protest, setting forth the grievance, should be submitted in writing ...", and provides for certain time periods.

2. It is undisputed that Sterile's written protests filed prior to the hearing before the Acting Chief Procurement Officer did not in any way allude to the OSHA-20 form issue which Sterile sought to raise at the hearing. It is likewise undisupted that Sterile knew or should have known of that ground of protest no later than October 4, 1983, when it was provided with full information surrounding the award.

3. Sterile argued before the Panel that since its notice was in writing and made all concerned aware that a protest existed, Sterile could validly argue any ground of protest. The Panel disagrees. While the Panel does not intend to require that the specificity of protests be judged by highly technical or formal standards, the Panel concludes that § 11-35-4210(1) does require that the protest must in some way alert the parties to the general nature of the grounds

for protest. Since the present protest was admittedly devoid of any statement from which it could reasonably be deduced that the OSHA-20 form matter was intended to be a ground of protest, the Panel must conclude that the minimal requirements of § 11-35-4210(1) were not met.

4. Since the only ground which Sterile presented to the Panel was not timely raised in writing before the Acting Chief Procurement Officer, the Panel concludes that the appeal must be dismissed. In so doing, the Panel intimates no view as to the correctness of the Acting Chief Procurement Officer's decisions on matters which were not presented to the Panel for review.

AND IT IS SO ORDERED.

SOUTH CAROLINA PROCUREMENT REVIEW PANE

SENATOR HUGH K. LEATHERMAN, CHAIRMAN

December 19th, 1983

STATE OF SOUTH CAROLINA COUNTY OF RICHLAND	)))	BEFORE THE SOUTH CAROLINA PROCUREMENT REVIEW PANEL CASE NO. 1983-18

IN RE: PROTEST BY FLORENCE CRITTENDON HOME	)))))	O R D E R

This matter is before the Panel for administrative review pursuant to §§ 11-35-4210(7), South Carolina Code of Laws of 1976, as amended. The Determination by the Materials Management Officer concluded that the Florence Crittendon Home of Charleston, South Carolina ("FCH") was wrongfully denied a portion of the contract for special services for unmarried mothers and that a portion of the contract which should have gone to FCH went to Florence Crittendon Services, Inc. ("FCS"), of Charlotte, North Carolina. The Determination recommended that FCH apply to the Panel for reimbursement of actual costs incurred in the solicitation and other relief.

FINDINGS OF FACT

L. On an unspecified date, but prior to August 3, 1983, the State Department of Social Services ("DSS") issued Request for Proposal No. 3400, seeking proposals for Special Services for Unmarried Mothers. DSS received two proposals, one each from FCH and FCS; these were opened on August 19, 1983. The end result was that FCH was awarded 6,964 service units at $25.94 per unit (instead of 9,277 units

prepared by FCH at substantially the same price), and FCS was awarded 1435 units at $25.84 per unit. (FCS was also awarded 3142 units at $35.47 per unit, but those units involve medical care, a service which FCH does not provide, and that portion of the award is thus not involved in this appeal.)

2. DSS assembled a five-member evaluation panel to examine the proposals. The RFP stated that proposals would be evaluated on the following criteria:

"A. Understanding of the problem and soundness of approach

1. Program description

2. All service elements under Scope of Service are addressed

3. Treatment needs of the client population

B. Qualifications

1. Relevant and recent experiences in providing services applicable to this RFP

2. Qualifications of staff (See Exhibit IV)

3. Proximity of facility to client population

4. References (if new contractor)

5. Ability to be operational within thirty (30) days of a signed contract

C. Price

1. Cost per Unit

2. Number of clients to be served

3. Number of Units to be delivered (Unit is one twenty-four (24) hour period)."

3. The evaluators gave a total average score of 92.8 points out of a possible 95 to FCH and 93.6 points out of a possible 95 to FCS.

4. The award decision awarded a portion of the contract to each offeror based on a split proration of the available dollars; the ratio as in the the then-current contracts was used to prorate the awards between the two providers. The rate offered per unit was said to be the lesser of the 1982-83 contract rate, actual rate or requested rate.*

5. The unit rate offered to FCH was only one one-thousandth of a cent less ($25.94 rather than $25.941) than FCH proposed; in addition, it was $1.10 per unit more than was offered to FCS.

6. FCH protested DSS's award to the Materials Management Officer by a letter dated September 27, 1983. The following grounds for the protest were stated:

A. The award was not made in accordance with § 11-35-20(F) (maximizing purchasing power of the State) or § 11-13-1530(7) (award to be made to offeror whose offer is most advantageous to the State).

B. The award violated § 11-35-1530(7) for the additional reason that "recommendations were based upon allocations last year," a factor allegedly not encompassed within the stated evaluation criteria.

---

* The record contains no indication as to how "actual rate" differs from the 1982-83 contract rate, what is meant by the term, what the "actual" rates were, or how they were arrived at.

C. The approved rates were without basis in fact.

D. The resident vendor preference of § 11-35-1520(9) was ignored.

E. An additional issue was raised by letter dated October 17, 1983. That ground was that the award to FCS was improper because FCS was a foreign corporation not registered or licensed by the South Carolina Secretary of State.

7. The Materials Management Officer held a hearing on October 18, 1983, and issued a decision on October 27, 1983. That decision concluded as follows:

1. The evaluation methodology "did not provide for due consideration of the real hard dollar unit service cost offered in each proposal."

2. The award was based on dollar availability, split prorationally on current funding levels, a factor or factors not mentioned in the RFP.

3. The evaluation criteria did not take into consideration the relative importance of price.

4. If cost had been evaluated as referenced in the RFP, FCH would have achieved sufficient point assignment to be determined the most responsive and responsible bidder.

8. In concluding that the entire contract should have gone to FCH, the Materials Management Officer noted that a contract had already been given to FCH, and recommended that FCH apply to the Panel, as provided for in § 11-35-4410 (actually § 11-35-4210(7)) for reimbursement of costs and other relief.

9. FCH, on November 7, 1983, made such application. It waived the cost of preparing its offer, but seeks reimbursement of the costs incurred in pursuing the protest. By way of "other relief," FCH requests that the Panel amend the contract by adding 2, 313 units at a cost of $60,011, or in the alternative that the Panel award damages to FCH in the amount of $60,011.

CONCLUSIONS OF LAW

1. The Panel finds that in reviewing requests for remedy under § 11-35-4210(7), the Panel has the duty and authority pursuant to § 11-35-4410(5) and (6) to examine the Chief Procurement Officer's decision.

2. The Chief Procurement Officer, in the opinion of the Panel, erred in concluding that it was improper for DSS to make the award based on funding availability and for DSS to split the award prorationally between the two offerors. Funding availability is an inherent prerequisite to any government procurement, and to require a statement that funding availability is a criterion would be to require a statement of the obvious. Likewise, a proportional award under this RFP was not improper. The RPF in no way suggests that an award, if made, would be exclusive, and, like the availability of funds, the power to make more than one award was inherent in the procuring agency and needed no explicit statement in the RFP.

3. The Panel concludes that the evaluation of cost was proper. Since FCH provides comparable service to that provided by FCS, but at a higher price, it is difficult to see how the State's interests would have been better served by a greater award to FCH.

4. In summary, the Panel concludes that DSS acted properly within the terms of the RFP. It found the two offers to be roughly equal and made the award based on funding availability and geographic distribution of the client population, a factor explicitly set forth in the RFP.

5. FCH has also asserted that an award to FCS was improper because FCS is a foreign corporation not domesticated in South Carolina. However, the Panel concludes, based in part on Attorney General's Opinion No. 3008 (1970), that this does not invalidate the contract. In any event, FCS will provide all its services in Charlotte, North Carolina.

6. Likewise, the instate bidder preference question raised by FCH is inapplicable. The preference by its terms does not apply to RFP's, but only applies to competitive sealed bids submitted under § 11-35-1520.

7. Since the Panel concludes that DSS properly awarded the contract within the criteria set forth in the RFP, it is unnecessary to consider the request for remedial relief submitted by FCH. The Panel would note in addition that in the

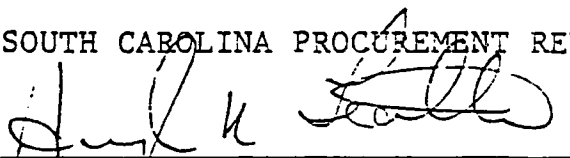
Panel's opinion it is improper for Chief Procurement Officers to make recommendations as to further relief to be sought by persons who appear before them. Such actions, in the view of the Panel, are inappropriate for adjudicatory officers.

Finally, the Panel would point out to DSS and to other state agencies that, while not constituting grounds for vacating the award, the use of an RFP in this case may not have been the most appropriate procedure. The service solicited has been provided to the State for some years, its dimensions must be well known by now, and there appears to be no reason why competitive sealed bidding could not have accomplished the State's purposes. Overuse of the RFP process tends to undermine the preference expressed in § 11-35-1510 for competitive sealed bidding and substitute negotiations for sealed bidding. Accordingly, the Panel would caution state agencies that excessive use of the RFP process might lead to a challenge in the future.

For the reasons set forth above, the Panel concludes that DSS did not make an improper award. Accordingly, the decision of the Chief Procurement Officer is hereby vacated.

AND IT IS SO ORDERED.

SOUTH CAROLINA PROCUREMENT REVIEW PANE



SENATOR HUGH K. LEATHERMAN, CHAIRMAN

December 19th, 1983

1983-18C FLORENCE CRITTENDON HOME

STATE OF SOUTH CAROLINA,) :	IN THE COURT OF COMMON PLEAS
COUNTY OF CHARLESTON.)	CASE NO. 84-CP-10-144
FLORENCE CRITTENTON HOME,) PETITIONER,) VS.) SOUTH CAROLINA PROCUREMENT REVIEW PANEL AND SENATOR HUGH K. LEATHERMAN, SR.,) RESPONDENTS.)	ORDER.

This matter is before the Court on the Petition of the Florence Crittenton Home of Charleston, South Carolina (FCH) for judicial review pursuant to § 1-23-380, S. C. Code of Laws (1976) and of the December 19, 1983 Order of Determination of the Respondent South Carolina Procurement Review Panel.

FACTS

The facts underlying this action are essentially not controverted. The case arises from a dispute concerning the actions of the Department of Social Services (DSS) on a Request for Proposal (RFP) in August, 1983. DSS received two responses to its RFP, one from FCH and one from Florence Crittenton Services, Inc. (FCS) of Charlotte, North Carolina. After DSS evaluated the two proposals, FCH was offered a contract in which DSS would pay essentially what FCH proposed for each unit of service, but for fewer units than FCH proposed to provide. FCH in effect agreed to provide those services at that rate but filed a protest with the Chief Procurement Officer (CPO) pursuant to § 11-35-4120.

The CPO, in a written decision dated October 27, 1983, concluded that "FCH was aggreived in connection with the award of this contract," and recommended that FCH apply to the Procurement Review Panel for reimbursement of bid preparation costs and other relief.

FCH then applied to the Panel for relief pursuant to § 11-35-4210(7), which provides for such applications when "a protestant should have been awarded the contract under a solicitation but is not ... ." Neither FCS, DSS nor the Materials Management Office (Division of General Services) appealed the decision of the CPO, although DSS and the Materials Management Office did appear before the Panel at the hearing on FCH's request for relief. After hearing evidence from FCH and DSS, the Panel concluded that it had the power and duty to examine the merits of the CPO's decision. It then concluded that DSS's actions were proper, and vacated the CPO's decision in an Order of Determination dated December 19, 1983.

DISCUSSION

A.

The threshold issue before the Court is whether the Panel has the statutory authority to review a CPO's decision when none of the parties before the CPO have chosen to appeal his decision. If the Panel were to be considered an appellate court and the CPO a trial court, this Court would likely conclude that the merits of the CPO's decision were not properly before the Panel. But the Panel is not an appellate court, and the statute which creates it does not limit its authority in the way that an appellate court's review jurisdiction is usually limited. § 11-35-4410(5), which sets forth the Panel's jurisdiction, provides that the Panel "shall be vested with the authority to ... review all written decisions rendered under [§] 11-35-4210... ." (emphasis added). The Panel is further empowered

by that subsection to "establish its own rules and procedures for the conduct of its business...," and to "interview any person its deems necessary." This language on its face authorizes the Panel to examine any written decision rendered by a CPO under § 11-35-4210, regardless of whether any party who was before the CPO chooses to appeal the decision to the Panel.

This broad power of the Panel is further confirmed by § 11-35-4410(1). That subsection lists the powers of the Panel as including:

> ... the responsibility of providing an administrative review of formal protests of decisions arising from the solicitation and award of contracts *** or any other decision, policy or procedure arising from or concerning the expenditure of state funds for the procurement of any supplies, services or construction... . (emphasis added).

This provision thus authorizes the Panel, as does § 11-35-4410(5), to review any and all decisions related to procurements by the State. This latter responsibility is listed disjunctively with the duty to review bid protest decisions. Thus, the Panel does not sit merely to review decisions of chief procurement officers as contested awards. Further, the Court is of the opinion that the General Assembly deliberately chose to grant the Panel the broad powers set forth above.

B.

The Petition also raises questions as to the correctness on the merits of the Panel's decision, assuming the Panel has statutory authority to consider the merits, as this Court has concluded. The Court has considered the merits of the Panel's decision and concludes that it should be affirmed for the reasons set forth herein and for the other reasons set forth in the Order of Determination. FCH's complaint, in essence, was that it was not told in the RFP that funding availability might limit the award or that the award

might be split prorationally with another bidder. However, as the Panel correctly concluded, "[f]unding availability is an inherent prerequisite to any government procurement, and to require a statement that funding availability is a criterion would be to require a statement of the obvious." Order of Determination, p. 5. Likewise, FCH could not have claimed unfairness based on the proration of the award. The RFP stated that geographic distribution of the client population would be considered, and the award was prorated on that basis; indeed, the ratio between FCS and FCH was the same as it had been in the previous fiscal year.

The Court recognizes that in cases such as this where the vendor of services is funded in large part through government funds, the unavailability of full funding may place the vendor in the situation of having to take what the government offers. However, any problems experienced by FCH as a result of the procurement in question were not problems with the procurement process, but with the nature of FCH's necessary reliance on government funding even in a lean year. Even though FCH provides an obviously worthwhile service, its funding needs and the needs of its clients do not translate into a requirement that the State must provide it with everything it proposes. The RFP told prospective bidders all they needed to know to bid intelligently, and the award was based on the stated factors and the factors which inhere in any government procurement.

CONCLUSION.

For the foregoing reasons, the Court concludes that the Procurement Review Panel was vested with statutory authority to review the decision of the Chief Procurement Officer and that the Panel was correct in vacating that decision. Accordingly, the Court affirms

the Panel's Order of Determination of December 19, 1983, in all respects.

AND IT IS SO ORDERED.

JOHN HAMILTON SMITH
Presiding Judge
Ninth Judicial Circuit

SUMMERVILLE, SOUTH CAROLINA
June 18, 1984.

STATE OF SOUTH CAROLINA	)	BEFORE THE SOUTH CAROLINA
	)	PROCUREMENT REVIEW PANEL
COUNTY OF RICHLAND	)	CASE NO. 1984-1
IN RE:	)	
	)	
PROTEST BY MCKENZIE TRACTOR COMPANY, INC.	)	O R D E R
	)	

This matter is before the South Carolina Procurement Review Panel (hereinafter "Review Panel") for administrative review pursuant to South Carolina Code of Laws §§11-35-4210(5) and 11-35-4410(5) (1976, as amended) as a result of a Decision issued by the Materials Management Officer and a request for a review of that Decision.

FINDINGS OF FACT

South Carolina Wildlife and Marine Resources Department (hereinafter "Wildlife") determined that it needed a tractor at its Webb Wildlife Center in Garnett, South Carolina. The District Game Biologist filed a Purchasing Requisition requesting a "New John Deere Tractor, model 2950." Thereafter, this request flowed through the appropriate Wildlife Officials and to State Procurements (hereinafter "Procurement"). On or about January 11, 1984, Procurements solicited competitive bids, using a "Brand Name or Equal" specification, from approximately thirty (30) vendors. The bid specifications listed eleven (11) "approximate" features and product requirements to identify the salient characteristics of the equipment sought.

Ten vendors responded to Procurement's bid invitation -- nine (9) bidders offered the John Deere tractor, model #2950 and one (1) bidder, McKenzie Tractor Company, Inc. (hereinafter "McKenzie"), offered an Allis-Chalmers tractor, model #6080 as "equal" (for the purposes of the bid) to the John Deere #2950. McKenzie bid the Allis-Chalmers tractor at a price of $18,408.00 including tax. Payne and Williams, Inc. (hereinafter "Payne") was the lowest of the John Deere bidders at $20,549.36 including tax. Thus, McKenzie was the low bidder.

Wildlife and Procurement determined that the McKenzie bid was not responsive in that, among other factors, the Allis-Chalmers tractor, model #6080 was a four (4) cylinder tractor rather than a six (6) cylinder tractor. Payne was awarded the contract and Wildlife received a John Deere tractor, model #2950.

By letter dated March 1, 1984, to the Materials Management Officer, McKenzie timely protested the contract award to Payne on the grounds (1) that the Allis-Chalmers tractor #6080 was "equal" to the John Deere tractor #2950 within the meaning of that designation as defined by the Bid Invitation and (2) that McKenzie's bid was most advantageous to the State of South Carolina in that McKenzie's bid on the Allis-Chalmers tractor was over two thousand ($2,000.00) dollars less than Payne's bid on the John Deere tractor.

A hearing was held on March 13, 1984 before the Materials Management Officer. The Materials Management Officer issued his decision dated March 21, 1984, upholding McKenzie's protest finding that McKenzie's bid was responsive in that the Allis-Chalmers tractor #6080 was "substantially similar and equivalent" to the John Deere tractor #2950 and further finding that Procurement "failed to award the bid to the lowest responsible bidder."

Wildlife, by letter dated March 29, 1984, received by the Materials Management Officer and forwarded for filing with the Review Panel, requested a hearing before the Review Panel to overturn the decision of the Materials Management Officer. The Review Panel held a hearing in this matter on April 13, 1984.

The Bid Invitation must include the specifications for the product sought and all contractual terms and conditions applicable to the procurement. South Carolina Code §11-34-1520(2) (1976, as amended). Only the evaluation criteria set forth in the Bid Invitation may be used in the evaluation of the bid. South Carolina Code §11-35-1520(7) (1976, as amended). The contract is required to be awarded to the lowest responsible and responsive bidder whose bid meets the requirements and criteria set forth in the Bid Invitation. South Carolina Code §11-35-1520(10) (1976, as amended).

The term "specifications" is defined under South Carolina Consolidated Procurement Code Regulation 19-445.2140A(4)as follows:

> Specification means any description of the physical, functional, or performance characteristics, or of the nature of a supply, service, or construction item. A specification includes, as appropriate, requirements for inspecting, testing, or preparing a supply, service or construction item for delivery. Unless the context requires otherwise, the terms "specification" and "purchase description" are used interchangeably throughout the Regulations.

The purpose of specifications is to serve as the basis for procuring a product or service which is both adequate and suitable for the State's needs in a cost effective manner taking into account:

(1) Initial acquisition costs;

(2) The cost of ownership; and

(3) The cost of operation.

Specifications must clearly describe the State's requirements without being restrictive in nature. South Carolina Procurement Code Regulation 19-445.2140, Subsection B.

A "Brand-Name or Equal" Specification is a specification which uses one or more manufacturers' names or catalogue numbers to describe the standard of quality, performance, and other characteristics needed to meet the State's requirements and which provides for the submission of equivalent products, South Carolina Procurement Code Regulation 19-445.2140, Subsection A, Item 2.

The Bid Invitation at page 10 described "Brand Name or Equal" as follows:

> Contract Clause: Brand Name or Equal
>
> A. The items called for in this bid have been identified by a "Brand Name or Equal" description. Such identification is intended to be descriptive, but not restrictive, and is to indicate the quality and characteristics of products that will be satisfactory. Bids offering "equal" products including products of the brand name manufacturer other than the one described by brand name will be considered for award if such products are clearly identified in the bid response and are determined by the State to:
>
> 1. Fully meet the salient characteristics requirements referenced in the bid, or
>
> 2. Meet materially all characteristics of the specified item in the bid.

The approximate dimensions and features are set on page 5 of the Bid Invitation. The 4-cylinder feature is essentially equivalent to the 6-cylinder feature with respect to performance requirements. It is not necessary to set out a detailed analysis comparing the evant features of the Allis-Chalmers #6080 versus the John Deere 50. In sum, in the matter under consideration, the alternative

product, the Allis-Chalmer tractor, Model #6080 is substantially similar and equivalent to the John Deere tractor, Model #2950 in all of the relevant characteristics and requirements as set out in the Bid Invitation.

Therefore, it is the finding of the Review Panel that Procurement and Wildlife erroneously declared the McKenzie bid non-responsive.

CONCLUSIONS OF LAW

1. The Review Panel affirms the Decision of the Materials Management Officer dated March 21, 1984.

2. The Allis-Chalmers tractor, Model #6080 is substantially similar and equivalent to the John Deere tractor, Model #2950 in all relevant characteristics and requirements as set out in the Bid Invitation.

3. Procurement and Wildlife erred in declaring the McKenzie bid (the Allis-Chalmers #6080) to be non-responsive. A.K.L

4. The McKenzie bid was more than $2,000.00 lower than the next lowest bid.

5. McKenzie should have been awarded the contract under solicitation.

6. Pursuant to the authority of South Carolina Code §11-35-4210(7) (1976, as amended), the Review Panel recommends that the Budget and Control Board reimburse McKenzie the sum of $435.00, such sum having been found by the Review Panel to be an equitable and reasonable reimbursement for costs.

IT IS SO ORDERED.

May 8th 1984

SOUTH CAROLINA PROCUREMENT REVIEW PANEL

SENATOR HUGH K. LEATHERMAN, CHAIRMAN

STATE OF SOUTH CAROLINA	)	BEFORE THE SOUTH CAROLINA
	)	PROCUREMENT REVIEW PANEL
COUNTY OF RICHLAND	)	CASE NO. 1984-2

IN RE:	)	
	)	
PROTEST BY PADDOCK CONSTRUCTION COMPANY, INC.	)	O R D E R
	)	

This matter is before the South Carolina Procurement Review Panel for administrative review pursuant to Sections 11-35-4210(5) and 11-35-4410(6), South Carolina Code of Laws of 1976 as amended, as a result of a Determination issued by the Chief Procurement Officer for Construction and a Request for Review of that Determination.

Paddock Construction Company, alleging several grievances, contends that the procedure used in bidding the above project was erroneous and that Paddock should be awarded the swimming pool subcontract or another remedy.

The Panel does not reach the merits of Paddock's contentions because, as set forth below, Paddock's protest is untimely.

FINDINGS OF FACT

1. The above-captioned project was first advertised on December 28, 1983.

2. As originally advertised, the swimming pool portion of the contract called for a type of pool equipment which

Paddock Pool Co. does not manufacture, but which is manufactured by at least one other pool equipment company (Whitten Corporation) and perhaps others as well.

3. On January 13, 1984, Paddock's representative met with the architect, Mr. Usry, asking that Paddock equipment be considered equal to the equipment specified. A letter dated January 17, 1984, was to the same effect, namely, that Paddock be considered "an acceptable manufacturer to the plans and specifications."

4. On January 19, 1984, the Architect issued Addendum No. 1, which among other things changed the bid date to February 7, 1984, and set forth "Alternate No. 2." Alternate 2 was largely the same as the base bid specifications except to the extent that it called for the use of Paddock equipment instead of Whitten equipment. Paddock equipment was not listed as an approved substitution on the base bid, as Paddock had requested, but instead was listed only as an "alternate."

5. Paddock became aware of the Architect's issuance of Addendum No. 1, incorporating Alternate 2, at least as early as January 23, 1984 (See copy of Paddock's January 17 letter with Usry's handwritten reference to enclosure of Addendum 1, stamped "received" by Paddock on January 23). Paddock did not protest the issuance of this Addendum to the

Chief Procurement Officer until it filed the present protest nearly two months later, on March 16, 1984.

6. Instead, Paddock bid on Alternate No. 2. This was done first by a letter to all bidding contractors dated February 3, 1984; Paddock amended or attempted to amend its bid on Alternate 2 on several additional occasions after February 3.

7. On February 7, 1984, bids were received and taken under advisement, with the notification of award to come after all bids had been reviewed.

8. On February 16, 1984, during the review process, the architect notified Wise Construction Co. that its swimming pool subcontractor on the base bid, Hucks Pool Company, did not meet the experience qualification required by the specifications.

9. As a result, Wise proposed to substitute Price Aquatech as the base-bid swimming pool contractor. The architect accepted this proposal.

10. Although the substitution of Price for Hicks increased the amount of Wise's bid by $8600, Wise was still the low bidder among the general contractors, and was awarded the bid.

11. Hucks Pool Company never formally protested its rejection as a subcontractor, and is not a party to this proceeding.

12. The only protest filed by Paddock was filed on March 16, 1984.

CONCLUSIONS OF LAW

1. Section 11-35-4210(1) provides as follows:

> (1) Right to protest. Any actual or prospective bidder, offeror, contractor, or subcontractor who is aggrieved in connection with the solicitation or award of a contract may protest to the appropriate chief procurement officer. The protest, setting forth the grievance, shall be submitted in writing within ten days after such aggrieved persons know or should have known of the facts giving rise thereto, but in no circumstances after thirty days of notification of award of contract. (emphasis added)

The emphasized portions of this sentence make it clear that the right to protest can arise before a contract is let, and while the bid specifications are still being reviewed by prospective bidders. The 10-day time limit specifically does not run from the award of the contract but from the time the aggrieved person know or should have known of the facts giving rise to the grievance.[1/]

2. In this case Paddock knew of the architect's decision to list Paddock's equipment as an alternate at least as early as January 23, 1984. Since Paddock did not protest within 10 days of that time, § 11-35-4210(1) bars the protest that Paddock's equipment should have been given "or equal" status in the bid specifications.

[1/] The ten-day period is the only one the Panel need consider. See In Re Request of A.T.&T., Procurement Review Panel, November 18, 1983, p. 4 (attached).

3. The remainder of Paddock's protests are inextricably tied to its failure to protest the listing of its equipment as an alternate. Once the time for protest had passed without a protest by Paddock, Paddock could no longer claim that its equipment should have been listed as part of the base bid. The rejection of Hucks as a subcontractor on the base bid, which occurred after Paddock's time to protest had expired, was unrelated to any claim Paddock may have raised, because by the time Hucks was rejected on the base bid, Paddock's failure to protest foreclosed it from seeking to have the base bid changed. Since Paddock could not have sought to change the terms of the base bid specifications by that time, and since Paddock could not have bid on the base bid specifications unless they were changed, the general contractor could not have accepted a bid from Paddock on the base bid when Hucks was rejected.

4. The Panel therefore concludes that Paddock's protest was not timely filed pursuant to § 11-35-4210(1), and the protest is accordingly dismissed.

IT IS SO ORDERED.

SOUTH CAROLINA PROCUREMENT
REVIEW PANEL

SENATOR HUGH K. LEATHERMAN,
Chairman

June 14, 1984

STATE OF SOUTH CAROLINA)
) IN THE COURT OF COMMON PLEAS
COUNTY OF RICHLAND)

Paddock Construction Company, Inc., Appellant, -vs- South Carolina Procurement Review Panel, Respondents.	84 CP 40 2591 ORDER OF REMAND A. CAMDEN LEWIS FOR THE APPELLANT MALCOLM E. RENTZ, KENNETH P. WOODINGTON, AND JOSEPH McCULLOCH, JR. FOR THE RESPONDENTS

FILED
APR 29 3 39 PM '85
DARLEEN A. SCOTT
C.C.C.P.&G.S.

HEARD: April 17, 1985

This matter is before me for judicial review pursuant to a Final Administrative Decision.

Paddock is a construction company specializing in construction of swimming pools with related support items. Paddock submitted a bid on the project advertised by the University of South Carolina on December 2, 1983. The project contract was awarded to Wise Construction Company, Inc. as general contractor and Price Pool Company, Inc., as subcontractor. On March 16, 1984, Paddock filed a bid protest with the Chief Procurement Officer, John McPherson, Jr. McPherson filed a decision dated April 30, 1984.

Paddock filed a request for review pursuant to South Carolina Code §11-35-4210(5) (1976) before the South Carolina Procurement Review Panel. A hearing was held where both documentary evidence and oral testimony were taken. The Review Panel issued its Order of Determination June 14, 1984.

By Petition and Appeal of Final Administrative Decision filed July 4, 1984, the entire proceeding came before this court for judicial review.

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ATTEST
A TRUE COPY
Barbara A. Scott
C. C. C. P. & G. S.

The Order of Determination under South Carolina Code §11-35-4410(7) (1976) was a final administrative decision. Under South Carolina Code §1-23-380 (1976) the "agency shall transmit to the reviewing court the original or a certified copy of the entire record of the proceeding under review."

The record in a contested case, as this is, is defined in South Carolina Code §1-23-320(1976). That section specifically identifies what "shall" be in the record. South Carolina Code §1-23-320 (h) (1976) says:

> "Oral proceeding or any part thereof shall be transcribed on request of any party."

When the record was transmitted to the court, a transcription of the oral proceedings was not included. The parties stipulated and agreed that a request was properly made to the agency for such a transcript. It was also agreed that there was no stipulation allowing the record to be shortened. The tape of the oral proceeding was apparently lost or inadvertently destroyed prior to transcription. Paddock moved for an order remanding the entire proceeding to the Review Panel for a new hearing in the absence of a record.

A record is necessary for meaningful review. Eg. Environmental Defense Fund Ins. v. Hardin, 428 F2d 1093 (D.C. Cir. 1970). The proper course where a substantial defect is found in the administrative process is to remand such for further proceedings. Eg. Dick v. U.S. 330 F.Supp 1231 (D.C. DC 1972). Since there is no record for judicial review, remand is ordered.

This matter is remanded to the Procurement Review Board for the purposes of a full hearing to make a record on the merits of the bid protest.

Thomas J. Ervin

THOMAS J. ERVIN
Presiding Judge
Fifth Judicial Circuit

April 29, 1985

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STATE OF SOUTH CAROLINA)
) IN THE COURT OF COMMON PLEAS
COUNTY OF RICHLAND)

Paddock Equipment Company, Inc., Hucks Pool Company, Inc., and Paddock Construction Company, Inc.,

Plaintiffs,

vs.

University of South Carolina, Office of the State Engineer, Wise Construction Company, Inc. and Price Pool Company, Inc.,

Defendants.

ORDER

Docket No. 84-CP-40-2190

FILED
JUN 20 3 48 PM '84
JOHN R. I. HAYNSWORTH
C.C.C.P. & G.S.

This matter came before me on June 13, 1984, pursuant to the Petition of Paddock Construction Company, Inc. dated May 30, 1984, and a Rule to Show Cause executed by me on May 31, 1984. The hearing originally set thereon for June 4, 1984, was rescheduled by agreement of the parties for June 13, 1984.

Prior to this hearing, the Petitioner filed and served an Amended Complaint adding as additicnal Plaintiffs Paddock Equipment Company and Hucks Pool Company, Inc. In rendering my opinion I have considered this Amended Complaint.

At issue in the proceeding before me is a contract for the construction of an addition to the Williams Brice Building at Coastal Carolina College, Conway, South Carolina. The general contract for construction of this addition was awarded by competitive bid to the Defendant Wise Construction

ENTERED
JUN 20 1984

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C. C. C. P. & G. S.

Company, Inc. The subcontract for the performance of the swimming pool portion of this addition was awarded by Wise to the Defendant Price Pool Company, properly known as Julian H. Price Company, Inc.

The Plaintiffs Paddock Construction and Hucks Pool Company are engaged in the construction of swimming pools, and submitted bids to Wise for the construction of the pool. Paddock Equipment is a manufacturer of pool equipment who would have supplied equipment for use by the Plaintiffs had they been successful in obtaining the swimming pool subcontract. They allege that they were aggrieved in regard to the award of the pool subcontract, and seek an order enjoining any work on the pool subcontract by the named Defendants. The Plaintiffs also sought a mandatory injunction directing that one of the named Plaintiffs be substituted as subcontractor for the swimming pool.

The Plaintiffs have attached to their Complaint a letter dated April 30, 1984, wherein John McPherson, Chief Procurement Officer for Construction, issued his decision on a protest filed by Paddock Construction pursuant to §11-35-4210 of the S. C. Code of Laws. It is undisputed that the facts in issue in regard to the administrative protest currently being prosecuted by Paddock Construction as set out in the letter of April 30, 1984, are the identical facts upon which the Plaintiffs seek the injunctive relief prayed for in this Complaint.

The threshold question to be decided is whether the Plaintiffs have or had an adequate remedy at law for the wrongs complained of. The Defendants assert, and I agree, that the administrative review and award of bid preparation costs, up to $5,000.00, provided in §11-35-4210, provides an adequate remedy at law. I further conclude that this Code provision constitutes the exclusive remedy.

The Legislature, in enacting the provisions of the Procurement Code, §11-35-10, et seq. of the South Carolina Code, intended to set forth not only a means of administrative review, but the general contract principles upon which contracts with the State would be solicited, offered and accepted.

Persons who elected to submit bids pursuant to the State's invitation for bids do so pursuant to the statutory scheme for offer and acceptance contained in the Procurement Code. As part of this scheme of offer and acceptance, the State has specified the exclusive remedy available to those who deem themselves aggrieved by a solicitation or award of a contract, which remedy are the provisions of §11-35-4210.

Consequently, I conclude that the Plaintiffs have an adequate and exclusive remedy at law as provided in the Procurement Code, and that the relief sought in the Plaintiff's Petition and Amended Complaint should be denied, and this Proceeding dismissed.

Plaintiffs also argued that, as taxpayers, they sought to contest an addition to the contract price of some $8,000.00 due to the irregularities complained of. I conclude that the Complaint as plead does not properly raise this issue, and that the ruling herein concludes all issues. This dismissal is not, however, with prejudice to the Plaintiff's right to raise this issue in any subsequent proceeding they desire to institute.

Now, therefore, based on the foregoing,

IT IS ORDERED, that the Temporary Restraining Order contained in the Rule to Show Cause and Order dated May 31, 1984, is dissolved, and

IT IS FURTHER ORDERED that the Plaintiff's request for injunctive relief in this action is denied, and the proceeding bearing Docket No. 84-CP-40-2100 is dismissed, with prejudice.

AND IT IS SO ORDERED.

Walter T. Cox, III
Presiding Judge
Fifth Judicial Circuit

Columbia, South Carolina
19, 1984

PADDOCK EQUIPMENT COMPANY, Paddock Construction Company, Inc., and Hucks Pool Company, Inc., Appellants,

v.

UNIVERSITY OF SOUTH CAROLINA, Office of the State Engineer, Wise Construction Company, Inc., and Price Pool Company, Inc., Respondents.

No. 0739.

Court of Appeals of South Carolina.

Heard Feb. 27, 1986.

Decided June 23, 1986.

Unsuccessful bidders on public contract brought action against governmental entities and successful bidders on general contract and subcontract. The Common Pleas Court, Richland County, Walter T. Cox, III, J., denied injunctive relief and held that $5,000 referred to in statute provided adequate remedy at law and constituted exclusive available remedy. Unsuccessful bidders appealed. The Court of Appeals held that unsuccessful bidders, whose bid was wrongfully rejected, were not limited to $5,000 recovery.

Reversed and remanded.

Public Contracts ⇐10

Unsuccessful bidders whose bid on public contract was wrongfully rejected, were not limited to $5,000 recovery referred to in 1981 statute providing that bidder whose bid is wrongfully rejected may recover reasonable reimbursement amount and that review panel may make recommendations as deemed equitable, including reimbursement of bid preparation costs, not to exceed $5,000, and other relief; 1985 amendment to statute clarified that it was never the intention of Legislature to restrict total amount of recovery to $5,000. Code 1976, § 11-35-4210(7).

A. Camden Lewis and Mary Geiger Foster, Lewis, Babcock, Gregory & Pleicones, Columbia, for appellants.

Joseph M. McCulloch, Columbia, for University of South Carolina.

Henry W. Brown, Columbia, for Wise Const. Co., Inc.

Malcolm Rentz, Columbia, for Office of State Engineer.

John Chase, Florence, for Price Pool Co.

PER CURIAM:

This appeal arises from an Order of the Circuit Judge who held (1) that the Plaintiffs-Appellants were not entitled to injunctive relief, (2) that the Plaintiffs-Appellants have an adequate remedy at law and (3) that the $5,000 referred to in § 11-35-4210 Code of Laws 1976 provides an adequate remedy at law and constitutes the exclusive remedy available to a competitive bidder whose low bid was wrongfully rejected. At oral argument it was stipulated by counsel for the Plaintiffs-Appellants that the injunction sought has now become a moot question and that collection of a money judgment (a proceeding at law) is an adequate remedy. The heart of the appeal is the contention of counsel that the $5,000 limitation provided is not an appropriate remedy. We agree.

Plaintiff-Appellant, Paddock Construction Company, Inc., is engaged in the building of swimming pools; Plaintiff-Appellant, Paddock Equipment Company is a maker of swimming pool equipment. Plaintiff-Appellant, Hucks Pool Company, Inc., whose low bid was disqualified, is also engaged in the business of constructing swimming pools. Defendants-Respondents, University of South Carolina and State Engineer, are governmental entities. Defendant-Respondent, Wise Construction Company, Inc., is the successful bidder on a general contract awarded by the University; Defendant-Respondent, Price Pool Company, Inc., is the successful bidder which procured the subcontract Plaintiffs-Appellants claim should have been awarded to them after Hucks was disqualified.

In 1981 the General Assembly enacted the SOUTH CAROLINA CONSOLIDATED PROCUREMENT CODE. Its many purposes are set forth in its preamble. The gist is to promote increased public confidence in the procedures followed in public procurement, to insure fair and equitable treatment to all persons who deal with the procurement system of South Carolina and to foster effective broad-based competition for public procurement within the free enterprise system.

Section 11-35-4210(7) provides relief to one who alleges the Code regulations to have been violated to his detriment as follows:

> *Reimbursement for Reasonable Costs.* In the event a protestant should have been awarded the contract under a solicitation but is not, then such party may apply to the Review Panel, as provided for in Section 11-35-4410 for reimbursement of the actual costs, not to exceed five thousand dollars, incurred in connection with the solicitation including bid preparation. Upon receipt of such application the Review Panel may order the computation of a reasonable reimbursement amount and make such recommendations to the board as it deems equitable, including reimbursement of bid preparation costs, not to exceed five thousand dollars, and other relief.

In 1985 this subsection was amended so as to "... further provide for the relief which may be granted to a protestant which contends that he should have been awarded a contract under the Procurement Code." It now reads as follows:

> Reimbursement for Reasonable Costs and Authority to Grant other Relief. In the event a protestant contends that it should have been awarded the contract under a solicitation but is not, then the party may apply to the Review Panel, as provided for in Section 11-35-4410, for relief. Upon receipt of this application the Review Panel may order the computation and award of a reasonable reimbursement amount including reimbursement of bid preparation costs, and may order such other and further relief as justice dictates including, but not limited to, a reaward of the contract or a rebid of the contract. The decision of the review panel is the final administrative review and the decision of the review panel is appealable to the Circuit Court under the provisions of the South Carolina Administrative Procedures Act.

This action arising in 1984 requires a construction of the 1981 statute. The sole issue remaining in this appeal is whether the Plaintiffs-Appellants are limited to a recovery of $5,000 referred to in the Act of 1981 or whether they may receive other damages obviously now permitted by the Act of 1985. We are of the opinion that it was never the intention of the Legislature to restrict the total amount of recovery to $5,000. The 1985 amendment clarifies the matter.

> Whether a statutory remedy is exclusive or merely cumulated is ordinarily dependent upon the intent of the Legislature, as shown by the express terms of the statute prescribing the remedy. *Petition of State ex rel. Hutchinson*, 182 S.C. 369, 189 S.E. 475 (1937).

In construing a statute, significance should be given to all of its verbiage. The 1981 statute speaks of "... a reasonable reimbursement amount ..." and permits the Review Panel to make recommendations "... to the board as it deems equitable, including reimbursement of bid preparation costs, not to exceed five thousand dollars, *and other relief.*" (emphasis added)

While the argument of Defendants-Respondents has some appeal, we think that the Circuit Court Judge's Order construed the statute too narrowly. The construction we give to it is consistent with the purposes of the statute and tends to encourage bidders which is desirable. The construction which counsel for the Defendants-Respondents would give to the statute would allow governmental employees to disregard a lower bid and favor a higher bid to the detriment of the taxpayers while suffering

a penalty of only $5,000 regardless of the amount of the damages sustained.

We hold that the Trial Judge erred in ruling that the Plaintiffs-Appellants are limited to recovery of $5,000 damages. The matter is remanded to the Circuit Court for entry of judgment accordingly. In further proceedings, the Plaintiffs-Appellants may seek relief consistent with the views herein expressed.

REVERSED and REMANDED.

STATE OF SOUTH CAROLINA	)	BEFORE THE SOUTH CAROLINA
	)	PROCUREMENT REVIEW PANEL
COUNTY OF RICHLAND	)	CASE NO. 1984-6
IN RE:	)	
	)	O R D E R
PROTEST BY MILLER TIRE SERVICE	)	

This matter is before the panel for administrative review pursuant to Sections 11-35-4210(5) and 11-42-4410(6), South Carolina Codes of Laws of 1976, as amended, as a result of a Determination issued by the Chief Procurement Officer for Materials Management and a Request for Review of that Determination.

FINDINGS OF FACT

1. The State Procurement Office on March 22, 1984, solicited competitive bids for tire recapping services for the South Carolina Department of Education. Bids were opened on April 10, 1984, and Miller Tire Service was the apparent low bidder.

2. Page 10 of the Bid Invitation sets forth requirements for testing the rubber proposed to be used. Under "Testing", Paragraph A, the Bid Invitation stated:

> Recap Rubber samples of the apparent low bidder selected by the State, will be submitted for testing to an independent testing laboratory, also selected by the State. After evaluation, the contract will be awarded if the rubber passes the initial test. (Emphasis added).

3. Miller, the apparent low bidder, submitted a single sample of each of two types of rubber called for by the specifications. Upon testing by an independent laboratory, both samples failed to meet the specifications.

4. State Procurements then obtained samples from the second lowest responsible bidder, White Tire Company. Upon being tested, White's samples also failed to meet the specifications.

5. By the time both bidders' samples had been rejected, State Procurement became concerned that some provision needed to be made to insure that enough tires would be on hand for the opening of the school year. In order to meet the perceived need, State Procurement set up a meeting with Miller and White together on July 23, 1984, to determine under what circumstances, if any, the original solicitation and bids thereunder could be salvaged. At the meeting, however, it was disclosed by Miller that Miller had recapped enough tires under the old contract price to satisfy the immediate needs of the Department of Education. State Procurement nevertheless asked both White and Miller whether they would extend their prices under the March, 1984, solicitation, and both agreed to do so.

6. The disclosure that Miller Tire had continued to recap tires after the expiration of the old contract meant that time was no long of the essence to the State of satisfy the Department of Education's needs.

7. After considering all information available to it, State Procurement concluded that in view of the failure of the samples of Miller and White to meet the specifications, the excessiveness of the third lowest bidder's price, and the lack of an urgent need for the tires, all bids should be

rejected. The Director of State Procurement set forth in written document dated August 3, 1984, his conclusion that all bids should be rejected. A second bid solicitation was sent out several days later.

8. A letter dated August 14, 1984, Miller protested the resolicitation. The Chief Procurement Officer concluded that the rejection of all bids and the resolicitation were both proper, and Miller appealed that decision to the Panel.

CONCLUSIONS OF LAW

1. Section 11-35-1520(7) provides in part that: "The invitation for bids shall set forth the evaluation criteria to be used. No criteria may be used in bid evaluation that are not set forth in the invitation for bids."

2. The original invitation for bids, as previously mentioned, provided that "the contract will be awarded if the rubber passes the initial test." It is undisputed that neither Miller's nor White's rubber passed the initial test.

3. Section 11-35-1710 provides in part that "an invitation for bids . . . may be cancelled, or any or all bids or proposals may be rejected . . . when it is in the best interest of the State."

4. The Panel concludes that the language quoted above from the specifications made it impossible for State Procurement to accord any competitor a second chance at testing its product. A second test would effectively use criteria different from those set forth in the specifications in violation of § 11-35-1520(7).

5. Miller contends that the State's consideration of a joint award to Miller and White constituted a waiver of the failure of Miller's product to meet the testing requirement. The panel, however, concludes that the only reason for the State to have considered such an arrangement was the perceived urgency of the needs of the Department of Education, rather than on any alleged immateriality of the product's failure to pass the first test. Had such an award been made, it would have fallen under §11-35-1570 (Emergency Procurements), and would have required only "as much competition as practicable under the circumstances." Among the reasons for requiring the product to pass the initial test was to preserve competition under the specifications as then issued.

6. The Panel further concluded that State Procurement did not abuse its discretion in determining the the failure of Miller's product to pass the initial test was not subject to waiver under Regulation 19-445.2080. That regulation permits the waiver by the State of "minor informalities or irregularities." Such variations, by the terms of the regulation, are those which are merely matters of form or those having "trivial or negligible effect" on the price, quantity, etc. of the goods to be supplied. The failure of a product to meet the express testing requirements cannot be classed with the insignificant matters listed in or suggested by the aforementioned regulation.

7. For the foregoing reasons, the panel concludes that State Procurement properly rejected all bids and properly resolicited bids. The protest is accordingly denied, and the decision of the Chief Procurement Officer is confirmed.

AND IT IS SO ORDERED.

SOUTH CAROLINA PROCUREMENT
REVIEW PANEL

/s/ Hugh K. Leatherman
Senator Hugh K. Leatherman
For the Panel

Florence, S. C.
October 26, 1984

STATE OF SOUTH CAROLINA	)	BEFORE THE SOUTH CAROLINA
	)	PROCUREMENT REVIEW PANEL
COUNTY OF RICHLAND	)	CASE NO. 1984-7

IN RE:	)	
	)	
PROTEST BY ROYAL BUSINESS MACHINES	)	O R D E R
	)	

This matter is before the South Carolina Procurement Review Panel (hereinafter "the Panel") for administrative review pursuant to Section 11-35-4210(5) and Section 11-35-4410(5), S.C. Code Ann. (1976 and Cum. Supp.) as a result of a Bid Protest filed under Section 11-35-4210(1), S.C. Code Ann. (1976 and Cum. Supp.) and a request for review of the Determination issued by the Chief Procurement Officer for the Materials Management Office.

This request for review has been received from Royal Business Machines (hereinafter Royal), a vendor who participated in the above referenced bids for Plain Paper Copiers. Royal asserts that it was the low bidder on certain numbered lots and should therefore, have been awarded the contract for those lots. Royal has proceeded through the review process participating first in settlement conference and then an interview with the Chief Procurement Officer

(hereinafter CPO) whose decision is now before the Panel for review.

The decision of the CPO finds that Royal's bid is non-responsive and therefore, upholds the action of the Materials Management Office. Specifically the CPO finds:

1) that Royal's bid did not conform to the terms of the invitation to bid; and

2) that the State could not determine "the true annualized cost" of Royal's bid.

The Panel convened on October 22, 1984, to review the decision of the CPO. Both Royal and the State were represented by counsel. Each presented witnesses for interview. The Panel consisted of the following members: Senator Hugh Leatherman, Chairman, Representative Ron Cobb, Mr. Steve Bilton, Mr. Jules Hesse, Mr. Jeffrey Rosenblum and Mrs. Harriette Shaw.

Royal protests the determination of the Chief Procurement Officer on grounds that his award of lots 1, 2, 3, 4, 5, 6, 17, 18, 25, and 37 to other bidders is in error because Royal's bid was the lowest bid from a responsible and responsive bidder. The Panel finds that Royal is a responsible and responsive bidder and was the lowest bidder on the lots listed above based on the following facts and legal conclusions.

On July 19, 1984, the Materials Management office solicited bids for "Plain Paper Copier for period from October 1, 1984, through September 30, 1985," bid number 1-600-08/17/84-P. Bids were to be received until 2 p.m. on August 17, 1984. The specifications were amended on August 8, August 13, August 17 and August 23. The August 17 amendment changed the bid receipt date to 2 p.m. August 23.

There is apparently some ambiguity in the bid instructions and in the measure to be used by the State in evaluating the bids of vendors. In order to clarify any ambiguity in the written bid invitation the State held a pre-bid conference and made Mr. Warren available to answer vendors' questions subsequent to the conference. There was a mandatory pre-bid conference on August 1, 1984. Royal was represented at the conference by Mr. Russell Dixon. The purpose of the conference was to review the bid specifications for vendors and to answer any questions of vendors as to these specifications or the bid forms provided by the State. For any further questions vendors were told at the conference, as well as on the invitation to bid, to contact David Warren a procurement specialist in the Materials Management Office. Mr. Dixon contacted Mr. Warren in the course of filling out his bid forms to inquire whether a certain manner of listing of the costs in his bids would

conform to the State's directions. Mr Dixon stated that Mr. Warren approved his method of listing as conforming to the State's directions. There is no contrary evidence in the record. Mr. Dixon relied on Mr. Warren's representation to him that the method he used to fill out the forms for each lot would conform to the State's requirements. The State asserts that it is unable to understand the term "first included" on Royal's bids. Mr. Dixon says he used the term on the advice of Mr. Warren. There is no evidence to the contrary in the record. In a decision involving Data-Tec, S.C. Dept. of Highways and Public Transportation Bid No. 09563 the panel found as a matter of law "that the signature of an employee of the Department ..., with apparent authority to act for the Department ... was a waiver of [certain] requirements in the contract specifications." Mr. Warren was cloaked with the authority to explain and to approve a method of filling out the bid forms. His authority to do so was explicit on the bid documents. Mr. Dixon inquired of Mr. Warren as to the appropriateness of the method he wished to use to fill out the bid specifications and his method was approved by Mr. Warren.

This invitation to bid was for a one year contract for copy machines in 63 lots, that is, 63 different specifications. The State required in the bid invitations that the vendor's price "shall include all transportation and supplies for start up and installation charges to any authorized location in the State."

The forms used for each lot required the vendor to itemize the cost of supplies necessary to operate the machine for the yield of copies specified in the bid invitation. There were two purposes in this requirement. The State reserved the right to buy these supplies from any vendor and the State wished to project the per copy cost of the machines for their expected five year usefulness. The per copy calculation, a projected five year cost, was used as the determinant of the low bid. Royal was the low bidder based on this calculation on its bid sheets for Lots 1, 2, 3, 4, 5, 6, 17, 18, 25, and 37.

However, the State was not to pay any vendor on a per copy basis, nor was the State bound to a five year contract. In fact multi-year contracts are prohibited by Section 11-35-2030, S.C. Code Ann. (1976 and Cum. Supp.) The State was to pay vendors either a lump sum purchase price or a fixed rental retaining the right to purchase supplies from any vendor who might have compatible supplies at a lower price. The State had rights to renew the contract in subsequent years at stated rates of increase.

All parties agree that the basis of comparison of bids is the figure derived as the "annualized cost per copy," the projected five year cost. The dispute as to whether Royal's bid is lowest centers on whether that figure on Royal's bid was properly derived.

Royal, in preparing its bids, submitted all of the information requested by the State. It submitted a cost for

the term of the contract, a cost for the supplies based on a guaranteed minimum yield, a maintenance cost, and it submitted an annualized per copy cost based on a five year life for the machine. It used a method of submitting this information which had been approved by Mr. Warren in the Materials Management Office.

CONCLUSIONS OF LAW

1. The panel finds that the Office of Materials Management solicited bids for a one year contract for plain paper copiers to "include all transportation and supplies for start-up and installation" anywhere in the State.

2. The panel finds that the Office of Materials Management solicited information in the bids to allow projection of the per copy cost over five years for particular copiers.

3. The panel finds that Royal's method of filling out the bid forms was responsive in that it was approved by Mr. Warren, it included "all transportation and supplies for start-up and installation anywhere in the State, and it contained all of the information required by the State to project the per copy cost over five years for particular copiers.

4. The panel finds that the Office of Materials Management used the projected five year cost, "the annualized cost per copy," as the means of determining the lowest bidder.

5. The panel finds that Royal was the lowest bidder by this standard in lots 1, 2, 3, 4, 5, 6, 17, 18, 25 and 37.

IT IS THEREFORE ORDERED that all contracts in Lots 1, 2, 3, 4, 5, 6, 17, 18, 25 and 37 for the contract period October 1, 1984 through September 30, 1985, shall be filled by Royal. Any execution of contracts under these listed lots prior to the date of this order is hereby rescinded and Royal shall be substituted as the contractor.

THE SOUTH CAROLINA
PROCUREMENT REVIEW PANEL

Senator Hugh K. Leatherman
CHAIRMAN

October 25th, 1984

1984-7C ROYAL BUSINESS MACHINES

STATE OF SOUTH CAROLINA	)	
	)	IN THE COURT OF COMON PLEAS
COUNTY OF RICHLAND	)	
ROYAL BUSINESS MACHINES, INC. ,	)	
	)	
Petitioner,	)	
vs.	)	ORDER
INFORMATION TECHNOLOGY MANAGEMENT OFFICE of the Division of General Services of the State of South Carolina, and ACTA-FAX BUSINESS MACHINES, INC.,	)	
Respondents.	)	

The Petitioner, Royal Business Machines, Inc. has petitioned this Court for a Permanent Injunction to prohibit the State of South Carolina from awarding a contract for copying service to another company pending their appeal to the Procurement Review Panel. Acta-Fax Business Machines, Inc. presently designated as recipient of the contract has petitioned the Court successfully to be allowed to Intervene.

On July 19, 1984 bid invitations were mailed under Bid Number 1-600-08/17/84-P (as amended, 1-600-08/24/84-P) for "Plain Paper Copier for period from October 1, 1984 through September 30, 1985." Petitioner is a corporation doing business in Columbia, South Carolina, and is engaged in the business of manufacturing and selling copying machines and other business equipment. Respondent, Information Technology Managementment, Office of the Division of General Services of the State of South Carolina is an agency of the State of South Carolina (hereinafter referred to as State) and is charged with the responsibility of awarding contracts for copying machines for the State. Respondent, Acta-Fax Business Machines, (hereinafter referred to as Acta-Fax) a corporation doing business in the State of South Carolina is also engaged in manufacturing and selling copying machines and other business equipment.

In response to the bid invitation mentioned above, Petitioner Royal and Respondent Acta-Fax submitted bids. The Petitioner alleges that although it was the responsible and responsive low bidder, it was not awarded the contract. It is the State's contention, however, that the Petitioner's bid was unresponsive in that it did not provide unit costs as required by the bid form. Respondent Acta-Fax also alleges that the Petitioner's bid was not responsive.

The Petitioner alleges that on or about September 10, 1984, it was advised orally that its bid had not been accepted. On September 17, 1984, after an unsuccessful settlement conference between the Petitioner and the Respondent State, the Petitioner through its attorney, advised the State that they were protesting the fact that they were not awarded the contract. By letter dated September 28, 1984, an administrative hearing was scheduled for September 28, 1984. The Administrative hearing was conducted and apparently the administrative officer (based on statements made during the hearing before the court) issued his determinationn on October 4 or 5, 1984.

On September 28, 1984 the Honorable Edward B. Cottingham Presiding Judge of the Fifth Judicial Circuit, issued a temporary restraining order restraining the State from "...executing or performing any contracts or awards for Lot Nos. 1-6, 17, 18, 25 and 37 under Bid No. 1-600-08/17/84-P until such time as Petitioner herein receives due process through the exhaustion of the remedies provided under S.C. Consolidated Procurement Code, or until such further order of this court."

A hearing was set for October 5, 1984, for a determination to be made as to whether a permanent injunction should be granted. All parties appeared at this hearing either in person or through counsel. The Petitioner relied upon the record which included the previous order of the Honorable Edward Cottingham. The Respondent State was prepared to offer testimony to support its contention that 1) the Petitioner's bid was unresponsive and that 2) the State would suffer great harm if a permanent injunction was issued. The Respondent Acta-Fax was also prepared to offer evidence of the harm it would suffer if a permanent injunction was to be issued. Counsel for the State proffered into the record a synopsis of his witnesses' testimony. Counsel for the Petitioner and for Acta-Fax indicated that they did not totally agree with the summary presented. Based upon a review of the pleadings, briefs, statutes and statements of counsel, this Court makes the following - factual findings.

1. This Court has jurisdiction to hear this matter.

2. The State's proffered testimony was sufficient to establish some inconvenience and additional cost occasioned by a delay in implementing a contract on October 1, 1984 but was insufficient to establish that irreparable harm would be caused by the delay.

3. Similarly, the proffered testimony of Acta-Fax would have been sufficient to show some additional financial costs but was insufficient to establish irreparable harm.

4. The Petitioner failed to establish that they did not have an adequate remedy at law for redress of any alleged wrongs.

Based upon these factual findings, this Court' s interpretation of the statutes and common law, and after a careful consideration of the authorities and briefs submitted by the parties, this Court refuses to grant the Petitioner's request for a Permanent Injunction ruling that the Petitioner has an adequate remedy at law under the provisions of Section 1-35-4210 South Carolina Consolidated Procurement Code (1981) and other theories of the law it may elect to pursue.

The Temporary Restraining Order of Judge Cottingham is hereby dissolved as of 2:00 P.M., Friday, October 12, 1984. The reason for the delay in the dissolvement of the Temporary Restraining Order is to allow either of the parties aggrieved by this Order an opportunity to pursue any additional remedies they perceive may exist. Dismissal of the Temporary Restraining Order is without prejudice to Petitioner's right to litigate any of the issues raised before this Court in any subsequent proceedings.

IT IS SO ORDERED.

s/ Ernest A. Finney, Jr.
Ernest A. Finney, Jr.
Presiding Judge of the
Fifth Judicial Circuit

Sumter, S. C.

October 10, 1984.

STATE OF SOUTH CAROLINA)	
)	IN THE COURT OF COMMON PLEAS
COUNTY OF RICHLAND)	
Acta-Fax Business Machines,)	Docket No. 84-CP-40-4427
Petitioner,)	
)	
vs.)	ORDER
)	
South Carolina Procurement)	
Review Panel and Royal)	
Business Machines, Inc.,)	
Respondents.)	
)	
Monroe Systems for Business,)	Docket No. 84-CP-40-4447
)	
Petitioner,)	
)	
vs.)	
)	
South Carolina Procurement)	
Review Panel and Royal)	
Business Machines, Inc.,)	
Respondents)	
)	

This matter came before this Court on November 13, 1984, pursuant to the petition of Acta-Fax Business Machines (hereinafter "Acta-Fax") dated November 1, 1984, the petition of Monroe Systems for Business (hereinafter "Monroe") dated November 7, 1984, and a Rule and Order to Show Cause executed by this Court on November 5, 1984. The Rule to Show Cause ordered the respondents to appear before me to show cause "why this Court should not issue an immediate order staying the October 25, 1984 Order of Determination of the South Carolina Procurement Review Panel that rescinded the contract of Acta-Fax Business Machines with the State of South Carolina and substituted Royal Business Machines, Inc. as the contractor thereto." Arguments came on to be heard in this Court before the undersigned on November 13, 1984.

FACTS

This action arises from a dispute concerning the award of certain contracts by the State of South Carolina for plain paper copiers under

Bid No. 1-600-08/17/84-P (as amended, 1-600-08/24/84-P) for "plain paper copier for period from October 1, 1984, through September 30, 1985, and installed. "Royal was the apparent low bidder on Lot Nos. 1-6, 17, 18, 25, and 37 of the 63 lots bid upon, yet it was not awarded the contracts on those listed lots by the South Carolina Materials Management Office because that office decided that Royal's bid was not responsive to the bid invitation. Royal protested the award of these contracts to Monroe and Acta-Fax since Royal was the apparent low bidder, and Royal contended its bid was responsive. Royal proceeded under the South Carolina Consolidated Procurement Code Section 11-35-10, et- seq., through the review process, participating first in a "settlement conference" and then an "administrative hearing" with the Chief Procurement Officer (CPO) for the Materials Management Office, yet received no relief. Royal timely submitted its request for review to the South Carolina Procurement Review Panel (hereinafter "Panel") under S.C. Code Ann. Section 11-35-4210 and Section 11-35-4410. The Review Panel convened on October 22, 1984 to review the decision of the CPO. Present were representatives from Royal, the Materials Management Office, Acta-Fax, and Monroe. After interviewing witnesses, and reviewing relevant documents and the written decision of the CPO, the Panel issued its Order of Determination on October 25, 1984 in which it set forth its findings of fact and conclusions of law. The Panel found that Royal was a responsible and responsive bidder and was the lowest bidder on the lots listed above". Accordingly, the Panel ordered "that all contracts in Lots 1, 2, 3, 4, 5, 6, 17, 18, 25, and 37 for the contract period October 1, 1984, through September 30, 1985, shall be filled by Royal. Any execution of contracts under these listed lots prior to the date of this Order is hereby rescinded and Royal shall be substituted as the contractor." Following this Order of Determination, Acta-Fax and Monroe brought these actions as mentioned above.

DISCUSSION

The threshold issue before this Court in consideration of whether an immediate order staying the October 25, 1984 Order of Determination of the South Carolina Procurement Review Panel should be issued is whether or not the petitioners have set forth a prima facie case for injunctive relief. Petitioners assert that they are not seeking injunctive relief, but rather are requesting an "immediate stay" of the October 25, 1984, Order of the Panel under S.C. Code Ann. Section 1-23-380(c). That provision provides: "the filing of the petition does not itself stay enforcement of the agency decision. The agency may grant, or the reviewing court may order, a stay upon appropriate terms." Petitioners assert that a stay under this provision is different from injunctive relief and therefore they need not make a prima facie showing of entitlement to injunctive relief in order to be granted the stay they seek.

Petitioners' position is without merit. The "immediate stay" they seek is in actuality an injunction and, like other types of injunctive relief, is discretionary with the Court. Parker v. South Carolina

Dairy Commission, 274 S.C.209, 262 S.E.2d 38 (1980). In Parker, a consumer advocate brought a declaratory judgment suit challenging an order of the Dairy Commission and seeking injunctive relief pursuant to Section 1-23-380 of the Administrative Procedures Act. In upholding the trial court's grant of injunctive relief the court noted that the stay of an agency decision by a court under Section 1-23-380 is the equivalent of a temporary injunction: "whether the temporary injunction was granted pursuant to Section 1-23-380 of the Code, or as a result of the Court's general authority in a declaratory judgment action, is of little consequence. In either instance, the judge is allowed a broad discretion. We find no abuse." See also, D. Shipley, South Carolina Administrative Law, p. 7-57 (1983).

Being injunctive in nature, a stay of an administrative determination requires a prima facie showing that (1) the petitioner has no adequate remedy at law; (2) the petitioner has a likelihood of success on the merits, and (3) the conduct sought to be restrained will cause irreparable harm. Greenwood County v. Shay, 202 S.C. 16, 23 S.E.2d 825 (1943); Williams v. Jones, 92 S.C. 342, 75 S.E. 705 (1912). The burden of proving the entitlement to injunctive relief is upon the party seeking it. E.g. Moss v. South Carolina State Highway Department, 223 S.C. 282, 75 S.E.2d 462 (1953). In the case at Bar, both petitioners have failed to allege or present facts sufficient to prove any of the elements necessary to constitute a cause of action for injunctive relief. Rather, in their submissions to this court, petitioners have relied on legal conclusions.

First, petitioners have failed to show that they have no adequate remedy at law in this case. Ample authority exists for the proposition that injunctive relief is not an appropriate remedy for a disappointed bidder, at least in the absence of a clear violation of duty by government officials, which has not been shown by petitioners in this case. As the Court stated in M. Steinthal and Company v. Seamans, 455 F.2d 1289(D.C. Cir. 1971), "the balancing of the public interest in free and fair competitive bidding... requires informed judgments by officials continuously faced with such decisions, not by the courts which are unfamiliar with, and ill equipped to handle, problems couched in these procurement policy terms." Id. at 1304. For those reasons and others, the Court in Steinthal denied injunctive relief, leaving the disappointed bidder to an action for damages. Accord, William F. Wilkey, Inc. v. Department of the Army, 357 F. Supp. 988 (D Md. 1973), aff'd., 485 F.2d 180 (4th Cir. 1973).

Nor have petitioners made a prima facie showing of irreparable harm. Any alleged harm that might be suffered by petitioners if a stay is not granted would be monetary, and is the same as the harm that Royal, the apparent lowest responsive bidder, would suffer if a stay were granted. Moreover, the public welfare will suffer if the award of the contracts in question by the Panel is stayed in that the taxpayers will be denied copiers for the lowest cost for the length of the stay. In balancing the equities between the parties involved,

this Court determines that petitioners have not shown a likelihood of irreparable harm.

Finally, Petitioners have not alleged or shown a likelihood of success on the merits in this case. At argument, they asserted that the Panel's standard of review of the Order of the CPO is such that the CPO's determination "shall be final and conclusive unless clearly erroneous, arbitrary, capricious, or contrary to law" pursuant to S.C. Code Ann. Section 11-35-2410. Petitioners assert that the Panel's Order of Determination made no finding that the CPO's decision was either clearly erroneous, arbitrary, capricious, or contrary to law, and thus the Panel exceeded its scope of review. However, the statutory language is clear under Section 11-35-2410 that the previously stated standard of review applies only to certain specific ministerial determinations which are listed in the provision. A review of the determinations listed reveals that the determination by the CPO in this case does not fall in any of these special categories and thus is not a determination which shall be final and conclusive unless clearly erroneous, arbitrary, capricious, or contrary to law. Thus, this assertion by petitioners as to the Panel's scope of review is without merit. Moreover, the language of Section 11-35-4410(5) clearly authorizes the Panel to hold its hearings de novo by specifically vesting the Panel with authority to take testimony and review documents. The General Assembly has clearly vested the Procurement Review Panel with broad discretion to protect the expenditure of public funds and thereby the taxpayers of this State. The Panel must grant such relief as is necessary to effectuate this and the other purposes set forth in Section 11-35-20.

The petitioners have failed to present a prima facie showing of the elements required to entitle them to an immediate stay of the Procurement Review Panel's Order of Determination. Thus, it is hereby ORDERED that Petitioners' request for a stay of the Panel's Order of Determination is DENIED.

It is further ORDERED that the Materials Managment Office shall immediately comply with the Order of Determination of the South Carolina Procurement Review Panel of October 25, 1984 and that all contracts in lots 1, 2, 3, 4, 5, 6, 17, 18, 25 and 37 for the contract period October 1, 1984 through September 30, 1985 shall be filled by Royal, and, as further provided in the Panel's Order of Determination, any contracts or purchases between Petitioners and the State of South Carolina under these lots that have previously been executed are rescinded.

IT IS SO ORDERED.

/s/ Lawrence E. Richter, Jr.
Lawrence E. Richter, Jr.
Presing Judge, 5th Judicial Circuit

Columbia, South Carolina
November 15, 1984

THE SUPREME COURT OF SOUTH CAROLINA

EX PARTE: South Carolina Division of General Services, Petitioner,

IN RE: Acta-Fax Business Machines, Appellant-Petitioner

v.

South Carolina Procurement Review Panel and Royal Business Machines, Inc., Respondents,

and

South Carolina Procurement Review Panel and Royal Business Machines, Inc., Respondents,

---

O R D E R

All parties in this matter have petitioned the Court to determine the scope of authority of the South Carolina Procurement Review Panel.

The Procurement Review Panel was created by the legislature to serve as an advisory body to the Budget and Control Board in protests arising under S.C. Code Ann. §§11-35-4210, 11-35-4220, and 11-34-4230 (Supp. 1983). It has no authority to make or rescind contracts, or to order the Division of General Services to do so. In protests arising under §11-35-4210, the Panel is empowered only to determine whether an unsuccessful bidder should have been awarded a contract, and to make recommendations to the Budget and Control Board for relief to the aggrieved bidder. §11-35-4210(7); §11-35-4410(5) (Supp. 1983). Additionally, §11-35-4210(6) provides that "the request for a review shall not stay the contract unless fraudulent."

It is therefore ordered that the portion of the Procurement Review Board's order of determination dated October 25, 1984, which purported to rescind existing contracts and to substitute Royal Business Machines, Inc. as contractor, is void.

/s/ C. Bruce Littlejohn A.J.

/s/ Julius B. Ness A.J.

/s/ George T. Gregory A.J.

/s/ David W. Harwell A.J.

/s/ A. Lee Chandler A.J.

COLUMBIA, SOUTH CAROLINA

December 17, 1984

STATE OF SOUTH CAROLINA	)	BEFORE THE SOUTH CAROLINA
	)	PROCUREMENT REVIEW PANEL
COUNTY OF RICHLAND	)	CASE NO. 1985-0

IN RE:	)	
	)	
PROTEST BY CONSTRUCTION TRAINING SERVICES	)	O R D E R
	)	

April 12, 1985

The Honorable E. Crosby Lewis
Lewis, Lewis, Bruce & Truslow
Keenan Building
Columbia, South Carolina

Dear Representative Lewis:

I have received your letter which requests a review by the South Carolina Procurement Review Panel. You represent Construction Training Services in proposal number: 6/7-794-1112103-12-20-842. Your client seeks review of a decision by Mr. Richard Campbell dated March 29, 1985, in which he ruled that Construction Training had not raised any appealable issues. Accordingly, he dismissed the appeal for lack of jurisdiction.

Under §11-35-4210(5), Mr. Campbell's decision is final unless the aggrieved party requests a review by the Panel within 10 days of the decision. Mr. Campbell's decision was rendered on March 29, 1985, by letter to Mr. Tommy Caldwell of Construction Training. The ten day period for protest ended on Monday, April 8th. Your letter is dated April 10th and was delivered to me on the same day.

Based on the above referenced statute, your request for review by the Panel is untimely. I have been directed to inform you that your request for review is dismissed for lack of jurisdiction in the Panel.

Sincerely,

Frank Caggiano

FC:jr

cc: Senator Hugh K. Leatherman
Ms. Helen McFadden
Bob Merritt

STATE OF SOUTH CAROLINA)	BEFORE THE SOUTH CAROLINA
)	PROCUREMENT REVIEW PANEL
COUNTY OF RICHLAND)	CASE NO. 1985-1

IN RE:)
)
PROTEST BY POWERS CONSTRUCTION) O R D E R
COMPANY, INC.)
)

This matter is before the South Carolina Procurement Review Panel (hereinafter "Panel") for administrative review pursuant to Section 11-35-4210(5) and Section 11-35-4410(5), South Carolina Code of Laws, 1976, as amended, as a result of a Bid Protest filed under Section 11-35-4210(1), South Carolina Code of Laws, 1976, as amended, and a Request for Review of the Determination issued by the Chief Procurement Officer for Construction from that Protest pursuant to his authority granted by Section 11-35-4210(2) and Section 11-35-4210(3).

INTRODUCTION

On or about March 20, 1985, the South Carolina Budget and Control Board (Board) issued an invitation for construction bids for three student housing buildings and a cafeteria at Francis Marion College, State Project No. H18-8320. Bids were received from W. C. Logan & Associates (Logan), and Powers Construction Company, Inc. (Powers), the protestant in this matter. Bids were opened in accordance with the solicitation

on April 30, 1985. After evaluating the bids, the Board determined that Logan had submitted the lowest responsive bid. Powers, as were all bidders, was informed on April 30, 1985, which bidder was the apparently low bidder.

On May 1, 1985, Powers timely filed a protest alleging that Logan had failed to list subcontractors as required in S. C. Code of Laws, §11-35-3020 (Cum. Supp. 1984) for (1) ceramic and quarry tile; (2) millwork; (3) steel; and (4) masonry. The statute requires a contractor to list any subcontractor who will fabricate or install a portion of the project for 2% or greater of the total bid on a project between three and five million dollars. Logan's bid on this project was $4,497,000. Thus, Logan was required to list any subcontractor whose materials, labor, or bid on the two combined, exceeded $89,940.

The State Engineer, John McPherson, conducted a hearing on the protest on May 9, 1985. All interested parties were present. In his May 13, 1985, decision, the Chief Procurement Officer determined that Logan had complied with Section 11-35-3020, that the bid submitted by Logan was responsive, and that Logan was the apparent low bidder. The contract was awarded to Logan and was executed on May 15, 1985. On that date, Francis Marion, the owner, sent Logan a Notice to Proceed with the contract.

Powers has abandoned its protest as to the necessity for Logan to list subcontractors for millwork, carpentry, and tile portions of the job. The tile listing was abandoned by omission from the letter of protest requesting review by the Panel on May 23, 1985. No evidence was presented by Powers on either millwork or carpentry at the hearing on July 1, 1985. This constitutes abandonment of these issues.

FINDINGS OF FACT

The testimony of Mr. Barden Rogers, chief estimator for William C. Logan and Associates, is that Logan prices the portions of a job in-house while receiving bids from various subcontractors. On this job Logan decided for various reasons to use multiple subcontractors on masonry, millwork, steel, and carpentry. No subcontractors for this work were listed on Logan's bid as the subdivision of these parts of the job as determined by Logan resulted in no subcontractor in these areas having any portion of the job greater than 2% of the total cost of the job. Mr. Rogers' estimation sheets, (Respondent's Exhibits 2, 4, 5, 7, 8, 9, 10) indicate how he chose to subdivide the parts of the job and the prices he estimated for the subdivided parts.

The parties offered conflicting testimony on whether such a subdivision for labor and purchase of materials is customary in the trade. The Panel makes no finding as to the

wisdom or custom of this practice. However, the Panel does find that this practice of Logan's was differently applied in steel pricing as compared to masonry, millwork, and carpentry.

Mr. Rogers testified that Logan had obtained a firm price and commitment from various subcontractors in masonry, millwork and carpentry on bid day. On bid day Logan's bid for these portions of the project was based on prices from various subcontractors and none of these bids were over the 2% so none were required to be listed.

The testimony as to the steel package in the Bid is equally unambiguous. On bid day, Logan had bids from two subcontractors, Grayco Steel and Southeastern Steel, and an estimation prepared in-house by Mr. Rogers. Both subcontractor's bids exceeded the 2% threshold and would have been required to be listed. Logan's estimation of the steel package, if totalled into a single bid, was comparable to the bids offered by the subcontractors. This total of Logan's exceeded the 2% listing threshold. The subdivision of the package by Mr. Rogers had no subpart exceeding the 2% threshold. Testimony by Mr. Rogers estimated 96 tons of structural steel at $825 per ton and showed that he had placed 20 tons of structural steel as miscellaneous.

On bid day a member of the Logan staff, Mr. Bill Jones, had detailed conversations by telephone with Mr. McDowell of Grayco Steel concerning the validation of Grayco's

bid on the steel package. Grayco's bid was the lower of the two steel bids received by Logan. Mr. Jones asked Mr. McDowell to validate his prices and the two of them compared what portions of the steel package were included in Grayco's bid, as well as the tonnage figures for different parts of the package submitted by Grayco. Representatives of Logan testified that the purpose of this conversation was to determine if there was an error in either steel bid and to ascertain the reason why there was a $40,000 difference between the two steel bids. These witnesses stated a belief that the difference in the two bids could only have been caused by errors of calculation or differences in the scope of the response to the bid, that is that the higher bidder was including more of the steel package in his bid. They pointed out the exclusion clause on Grayco's bid as the source of the latter belief. Mr. DeWitt of Southeastern Steel was also contacted on bid day to validate his bid.

Counsel to the protestant argued for a different inference on these facts. He argued that Logan used Grayco's bid to check its in-house estimation and to determine where the difference in tonnage calculation on structural steel lay. A different tonnage in calculation on that subpart of the package would make the structural steel exceed the 2% listing threshold. Logan's figures for structural steel plus miscellaneous structural steel are nearly the same as Grayco's.

On May 21 and May 22, 1985, Logan made two purchase orders for its structural steel: an order with Southeastern for columns and beams with plates, studs, and bolts for $84,647; and an order with Dixie Gabs for the miscellaneous steel at $26,796. Logan's total steel contracts equal $146,783.

Subsequent actions of Logan lead the Panel to conclude that the inference proposed by the protestants' attorney is correct. On bid day Logan had neither solicited nor received any bids on the steel package as subdivided in their estimation. Unlike their conversation with the millwork bidder, Blanton and Moore, they did not ask Grayco or Southeastern to "back out" of its bid certain parts of the package. Further, as Mr. DeWitt testified, Logan was still soliciting bids on parts of the steel package after signing the contract on May 15, 1985. And further at that time Mr. DeWitt was told by Logan that they could only accept from him a bid on the structural steel. Mr. Rogers and Mr. DeWitt testified to this limitation on the solicitation from Southeastern and to the source of this limitation being the 2% threshold for listing subcontractors. Mr. DeWitt could not bid on other parts of the package. He gave Logan a bid of $84,647 on the Class A steel on May 21, 1985. Grayco was not solicited for any subparts of the packages though on bid day their price had been lower than Southeastern's.

Testimony from various witnesses estimating the cost per ton of steel and the tonnage of structural steel required in the project indicate that either 96 tons of structural steel and 20 tons of miscellaneous steel or 109 tons of structural steel were required at an approximate cost of $88,000 to $94,000. These figures are the costs estimated by Logan - $80,500 for structural steel plus the structural steel in the miscellaneous category and the costs estimated by Grayco. The total figures from both for structural steel are above the threshold for listing of subcontractors. The figure for structural steel in Logan's estimates is based on the structural steel required in the cafeteria building. It leaves out the tonnage of structural steel required in the connectors to the buildings and places that tonnage under miscellaneous steel.

DISCUSSION OF THE LAW

All parties are agreed that Section 11-35-3020 applies to this solicitation and that a failure to comply with this section would render a bid non-responsive. The parties disagreed on the application of R.158 (1985), an amendment to §11-35-4410 of the Code to this proceeding.

The Panel, after considering the brief of Logan, finds that R.158 is properly the basis of its remedy as ordered because R.158 is a curative and remedial statute.

A curative or remedial statute is one passed to cure defects in prior law, or to validate legal proceedings, instruments or acts of public and private administrative authorities which, in the absence of such an act, would be void for want of conformity with existing legal requirements but which would have been valid if the statute had so provided at the time of enactment. It is evident that the 1985 procurement code amendments are curative or remedial. The statutes were amended to cure the defects that were made apparent by the South Carolina Supreme Court in Acta-Fax Business Machines, Inc. v. Royal Business Machines, Inc., South Carolina Supreme Court Order (Dec. 17, 1984), with regard to the powers and duties of the procurement review panel.

Remedial or procedural statutes are generally held to operate retrospectively. Hercules Inc. v. South Carolina Tax Commission, 262 S.E. 45 (1980). The only exception is where application of such statutes would impair the obligations of contract or vested rights. A contract, entered in violation of statute, is not one which can claim such protection. Both steel subcontractors had lumped all structural steel in their bids. Both steel subcontractors testified that this is the customary practice in their trade. Neither was requested prior to bid date to break out their bids in the fashion that Logan, after receiving the award, solicited a quote from Southeastern

Steel, though with at least one other bidder, the millwork, Logan had done so. On bid day Logan had solicited only lump sum bids on steel. Had Logan solicited bids on packages for steel that bid day, the state would have received the benefit of the lower prices received by Logan for the total steel package.

CONCLUSIONS OF LAW

1. S. C. Code Ann. (1976 and Cum. Supp.) §11-35-3020, and R.158 (1985) apply to this solicitation.

2. S. C. Code Ann. (1976 and Cum. Supp.) §11-35-3020(b) requires a general contractor to list all subcontractors who will "fabricate and install a portion of the work" exceeding a dollar value of 2% of the total where the total bid is between 3 and 5 million dollars.

3. A failure to list such subcontractors "renders the prime contractor's bid unresponsive."

4. Logan failed to list a subcontractor for the structural steel the cost of which is greater than the

2% threshold for listing. Logan's bid was therefore non-responsive.

5. It is the purpose of S. C. Code Ann. (1976 and Cum. Supp.) §11-35-3020 to have bidders present their bids firm on bid day, based on actual bids from subcontractors or themselves. The objective of this statute is to prevent bid shopping after the award.

6. Bidders may take appropriate steps to reduce costs to themselves and to the State, provided, this decision-making has been completed prior to bid opening and the price bid reflects commitments to the bidder with actual bids in hand on all aspects of the project. This is especially true where the subdivision of the job goes beyond what is customary in the trade.

7. On bid day a bidder's total bid must state any cost above the threshold amount.

8. If a bidder has no firm commitment for a portion of a project and chooses to use his own estimate for that portion of the project and that portion on which he has no commitment exceeds the threshold amount for

listing, then he must list himself as the subcontractor. He must be qualified to perform the work so listed.

IT IS ORDERED that the contract be re-awarded in accordance with the Code and with the views set out in this opinion.

Harriette Shaw
Vice-Chairman

Columbia, South Carolina
July 8, 1985

WILLIAM C. LOGAN & ASSOCIATES and Francis Marion College, of Whom William C. Logan & Associates is, Appellant,

v.

Hugh LEATHERMAN, Luther Taylor, Grady L. Patterson, Jr., Nikki G. Setzler, Harriette G. Shaw, Steve Bilton, Jules J. Hesse, Jeffrey Rosenblum, as officers and members of the South Carolina Procurement Review Panel, South Carolina Procurement Review Panel, Governor Richard W. Riley, Grady L. Patterson, Jr., Earle E. Morris, Jr., Rembert C. Dennis, Tom G. Mangum, and William T. Putnam, as officers and members of the South Carolina Budget and Control Board, Division of General Services, South Carolina Budget and Control Board, a Division of General Services, John A. McPherson, Jr., Chief Procurement Officer for South Carolina Budget and Control Board, a Division of General Services and Powers Construction Company, of whom Hugh Leatherman, Luther Taylor, Grady L. Patterson, Jr., Nikki G. Setzler, Harriette G. Shaw, Steve Bilton, Jules J. Hesse, Jeffrey Rosenblum, as officers and members of the South Carolina Procurement Review Panel, South Carolina Procurement Review Panel are Respondents.

Ex parte FRANCIS MARION COLLEGE, Plaintiff.

In re FRANCIS MARION COLLEGE and William C. Logan & Associates, Plaintiffs,

v.

POWERS CONSTRUCTION COMPANY and John A. McPherson, as Chief Procurement Officer, Division of General Services of the State Budget and Control Board, Defendants.

No. 22627.

Supreme Court of South Carolina.

Heard Oct. 9, 1986.

Decided Nov. 17, 1986.

Prime contractor appealed from order of the Common Pleas Court, Richland County, Thomas J. Ervin, J., requiring it to remit portion of profit from contract that had been awarded under procurement code. The Supreme Court, Harwell, J., held that: (1) bidder's failure, either negligently or intentionally, to list subcontractors in accordance with statutory requirements rendered bid nonresponsive, and (2) reaward of contracts was excessive in relation to violation by contractor of requirement that it list subcontractors, rather, contractor was required to remit $5,787 gain realized by its failure to observe proper bid procedure.

Affirmed.

1. **Public Contracts ⇐8**

Bidder's failure, either negligently or intentionally, to list subcontractors in accordance with statutory requirements rendered bid nonresponsive. Code 1976, § 11-35-3020.

2. **Statutes ⇐219(1)**

Construction of statute by agency charged with executing it is entitled to the most respectful consideration and should not be overruled without cogent reasons.

3. **Constitutional Law ⇐191**

Remedies provided in amendment to state Consolidated Procurement Act could be applied retroactively. Code 1976, §§ 11-35-10 to 11-35-5270.

4. **States ⇐98**

Reward of state contract was excessive in relation to violation by contractor of requirement that it list subcontractors, rather, contractor was required to remit $5,787 gain realized by its failure to observe proper bid procedure.

Susan B. Lipscomb of Nexsen, Pruett, Jacobs & Pollard, Columbia, for appellant.

Helen T. McFadden, Columbia, for respondents.

Atty. Gen. T. Travis Medlock and Deputy Atty. Gen. Frank K. Sloan, Columbia, for plaintiff Francis Marion College.

Daniel T. Brailsford, Columbia, for defendant Powers Const. Co.

Atty. Gen. T. Travis Medlock, Asst. Atty. Gen. David Eckstrom; and Malcolm Rentz, Columbia, for defendants South Carolina Budget and Control Bd., Div. of General Services, and John A. McPherson, Jr.

Daniel T. Brailsford, Columbia, for amicus curiae Specialty Trade Ass'n Council.

James B. Richardson, Jr., Columbia, for amicus curiae Associated General Contractors.

HARWELL, Justice:

This case involves a prime contractor's appeal from an order requiring it to remit a portion of profit from a contract that it had been awarded under the Procurement Code. We affirm.

Appellant Logan was awarded a contract by this State's chief procurement officer for construction of several buildings at Francis Marion College (FMC). Powers, another contractor who had bid on the job, protested the award, alleging that Logan failed to list certain subcontractors. Powers later abandoned its protest as to the necessity for Logan to list subcontractors for millwork, carpentry, and tile portions of the job. Only Logan's failure to list a subcontractor for steel work is involved in this appeal. Under the Procurement Code, a contractor is required to list any subcontractor who will fabricate or install a portion of the project for 2% or greater of the total bid if a project is between three million dollars and five million dollars. S.C. Code Ann. § 11-35-3020 (1976, as amended). Since Logan's bid on this project was $4,497,000, Logan was required to list any subcontractor whose bid exceeded $89,940.

The chief procurement officer, after notice and a hearing, affirmed the award of the contract to Logan. On appeal, the South Carolina Review Panel (Panel) found that Logan's bid was unresponsive due to the failure to list a subcontractor for the steel work. The Panel reversed the award of the contract to Logan and ordered that the contract be re-awarded.

The Panel's decision was appealed to the circuit court. The court temporarily enjoined the re-award. After a hearing on the merits, the circuit court permanently enjoined any re-award of the contract, affirmed the Panel's findings of fact and conclusions of law, and modified the Panel's order as to the remedy to be granted. Under the circuit court's order, Logan was required to remit to FMC the sum of $5,787. Logan appealed.

[1] The appeal from the Panel to the circuit court was governed by the Administrative Procedure Act. S.C.Code Ann. § 1-23-380 (1976, as amended). We agree with the circuit court that there is substantial evidence to support the Panel's decision that Logan negligently or intentionally failed to list subcontractors in accordance with S.C. Code Ann. § 11-35-3020 (1976, as amended) and that therefore Logan's bid was nonresponsive. It is irrelevant that the bidder may have had plans to gather additional bids in the future in such a manner that, according to the bidder's own in-house estimate, the subcontractor's bids would not have exceeded the threshold amount.

We agree further that there was substantial evidence on which the circuit court could uphold the Panel's determination that the May 15, 1985 amendment to S.C. Code Ann. § 11-35-4210 (1976, as amended) should apply even though the protest was filed on May 1, 1985. The right to protest an award or a contract was created in the South Carolina Consolidated Procurement Act. 1981 S.C.Acts 661. This Act was codified at S.C.Code Ann. §§ 11-35-10 through 11-35-5270 (1976, as amended). The amendment to this Act, 1985 S.C.Acts 344, merely affected the remedies which could be granted.

[2, 3] Remedial or procedural statutes are generally held to operate retroactively. *Howard v. Allen*, 368 F.Supp. 310 (D.S.C. 1973), *aff'd*, 487 F.2d 1397 (4th Cir.1973), *cert. denied*, 417 U.S. 912, 94 S.Ct. 2611, 41 L.Ed.2d 216 (1974); *Hercules, Inc. v. South Carolina Tax Commission*, 274 S.C. 137, 262 S.E.2d 45 (1980). The Panel determined that the 1985 amendment to S.C. Code Ann. § 11-35-4210 (1976, as amended) was curative or remedial and should apply retroactively. Construction of a statute by the agency charged with executing it is entitled to most respectful consideration and should not be overruled without cogent reasons. *Faile v. South Carolina Employment Security Commission*, 267 S.C. 536, 230 S.E.2d 219 (1976). The circuit court correctly determined that the remedies provided in the 1985 amendment to S.C. Code Ann. § 11-35-4210 (1976, as amended) can be applied retroactively.

[4] Lastly, we agree with the remedy effectuated by the circuit court. Logan's bid on the project was based on its own in-house estimate of $151,500 for the steel work. After submitting its bid, Logan subcontracted that portion of the job for $5,787 less. That savings of $5,787 would have been passed on to FMC had Logan solicited the subcontractor's bids on the steel package before bid day. The circuit court found that the Panel's remedy of re-awarding the contract was an unwarranted exercise of discretion under S.C. Code Ann. § 1-23-380(g)(6) (1976, as amended). The circuit court determined that a re-award of the contract was excessive in relation to the violation, especially considering the rights and liabilities of FMC. We agree with the circuit court that requiring Logan to remit the $5,787 gain realized by its failure to observe to proper bid procedure is a more suitable remedy.

AFFIRMED.

NESS, C.J., and GREGORY and FINNEY, JJ., concur.

CHANDLER, J., not participating.

STATE OF SOUTH CAROLINA	)	BEFORE THE SOUTH CAROLINA
	)	PROCUREMENT REVIEW PANEL
COUNTY OF RICHLAND	)	CASE NO. 1985-2

IN RE:	)	
	)	
PROTEST BY SPERRY-RAND CORPORATION AND TANDY CORPORATION	)	O R D E R
	)	

INTRODUCTION

This protest arises under Section 11-35-4410, as amended, and Section 11-35-4210, S.C Code Ann. (1976 and Cum. Supp.). Protestants Sperry-Rand Corp. (Sperry) and Tandy Corp. (Tandy) timely filed a protest of the award to International Business Machines (IBM) by Richland County School District No. 1 (District) of Bid No. 8485-29 for a Micro-Computer System and Peripherals.

The Materials Managment Officer, as Chief Procurement Officer (CPO) for the State, held a hearing on May 3, 1985, in which all parties listed above were represented by counsel. The CPO restricted his hearing to legal argument on the question of his jurisdiction to hear the protest. On May 8, 1985, he issued a

written decision holding that he had no jurisdiction in the matter. After this decision the protestants timely sought a hearing with the S.C. Procurement Review Panel (Panel).

All parties were notified by letter of June 7, 1985, that the Panel would conduct a hearing on the protest on July 1, 1985. They were further advised that should the Panel determine it had jurisdiction this hearing would consider the merits in the interests of economy of effort. No parties raised any objection to a hearing on the merits at this time and all parties brought their witnesses on that date.

On July 1, 1985, the Panel conducted a hearing to determine if the Panel had jurisdiction over this protest. All parties were present and represented by counsel. After deliberation, the Panel ruled orally that it had jurisdiction in this matter under the S.C. Consolidated Procurement Code, as amended, and that a hearing on the merits would be held on July 29, 1985, at 9:00 a.m.

The District initiated an action in the Circuit Court for injunctive relief to prevent the Procurement Review Panel from hearing this matter under the provisions of the S.C. Consolidated Procurement Code and for the judicial review of the Panel's determination of jurisdiction. The Honorable Tom Ervin, Judge in the Fifth Judicial Circuit, conducted a hearing on July 17, 1985, to consider the District's request for injunctive relief. The request for injunctive relief was denied. The petition for judicial review is pending at this time.

The Panel met on July 29, 1985, at 9:00 a.m. to consider the protest by Tandy and Sperry in this matter. The Panel consisted of

Senator Hugh K. Leatherman, Sr., Chairman, Harriette Shaw, Vice-Chairman, Jeffrey Rosenblum, and Jules Hesse. All parties waived the absence of a quorum and the Panel heard the protest on the merits.

FACTUAL BACKGROUND

The District contemplated the purchase of computers as early as the fall of 1984. At this time the District had received $63,466 under the S.C. Educational Improvement Act (EIA) for high technology equipment in vocational education courses. (District Board Minutes, 12/17/84) This recommendation resulted from an informal process and no official bids were ever sought by the District. At the District Board meeting of December 17, 1984, Dr. Jimmy Bales, Director of Career Education, presented a recommendation that the District purchase 120 microcomputers from IBM. The recommendation was not approved by the District Board and subsequently the request for proposal Bid # 8485-29 was issued.

The District issued a solicitation for Micro-Computer System and Peripherals, Bid #8485-29 on March 15, 1985. At the time of this bid solicitation the District had received three additional grants from the State Department of Education in the following amounts: $39,060.00; $53,340.00; $52,500.00. The total amount received was $208,366.00. It was earmarked for purchase of microcomputers ("high technology" equipment) for certain vocational programs in specified schools. All of the money had to be expended by June 1, 1985, or it would be forfeited back to the State Department. (Letter and

attachments of Francis Mack, Attorney for District 7/30/85 to Helen McFadden, Attorney to Panel)

On March 27, 1985, the bids were opened in the main conference room at Central Services Facility. The bid proposals as tabulated at this time ranged from a low of $176,972.27 submitted by Tandy to a high of $257,804.86 submitted by IBM (Memo from John Stevenson, 4/8/85, p. 155 Notebook)[1].

Part III, Special Instructions, of the formal request for proposal issued by the District (NB 156-166), Section 7 (NB 162), deals with the award of the contract. It provides that:

> "An award resulting from this request shall be awarded to the responsive and responsible bidder whose bid is determined to be most advantageous to the District, taking into consideration price and the evaluation factors set forth herein; (emphasis added) however, the right is reserved to reject any and all bids received and in all cases the District will be the sole judge as to whether a bid has or has not satisfactorily met the requirements of this RFB.
>
> Upon completion of evaluation, the responsible bidder will be notified and a Purchase Order will be issued for exact quantities of equipment."

The evaluation criteria were listed under Part III, Special Instructions, Section 16.1, (NB 164-165) as follows:

> The following factors - listing in order of relative importance - will be taken into consideration for purposes of bid evaluation: (a) Conformance of bid to RFB specifictions; (b) Suitability of proposed system for purpose; (c) Compliance to education and training. (In all cases, the District will be the sole judge as to whether a bid has or has not satisfactorily met the requirement of this RFB); (d) Vendor record of performance and integrity and financial strength; (e) Proposed maintenance

[1] The Notebook, hereinafter NB, is a volume of correspondence, memos and documents jointly submitted by agreement of all parties to the protest. Pagination was done by Panel staff for ease of reference at the hearing.

plan and the location of parts and vendor personnel needed to service and support the proposed system; (f) Total cost to be incurred by the District including five (5) years present annual maintenance rate less initial warranty period of system.

A review committee consisting of two members of the District's vocational department and two outside evaluators with prior experience in evaluating computer hardware was assembled by the District to evaluate the bids determined to be in compliance with the bid specifications. (Transcript 124-26). The committee concluded that only four of the bids submitted met the hardware specifications of the bid proposal and these four were reviewed by the evaluation team: Tandy, Sperry, Intertec, and IBM. The review committee used an evaluation form consisting of six (6) factors with a combined total of one hundred (100) points. (NB 176-271) These factors and their weights included: 1) Conformance of bid to specifications - yes or no; 2) Suitability of proposed system - 35; 3) Compliance to education and training - 30; 4) Vendor record of performance and integrity and financial strength - 15; 5) Proposed maintenance plan, location of parts, vendors service and support personnel - 10; and 6) Total Cost - 10.

The review committee members individually appraised the proposals and met on April 8, 1985, to tabulate their appraisals. The proposals were ranked according to their evaluation factor weights as tabulated by the review committee members. The rankings as tabulated were: 1) I.B.M.; 2) Sperry-Rand; 3) Tandy, and 4) Intertec. In a letter dated April 8, 1985, (NB 116) from John R. Stevenson, Deputy Superintendent, to members of the Board of District 1, the administration recommended that Bid #8485-29 (Microcomputer System and Peripherals) be awarded to IBM.

In a letter dated April 9, 1985, from John H. Porter, Jr., Director of Purchasing for the District, to Mr. Colie Dyson of IBM (NB 120), IBM was notified that its bid proposal had been accepted. A purchase order was included with this notification and notice to proceed with the requirements of the bid proposal was given. (NB 121-128)

Subsequent to these letters the District found errors in the tabulation and scoring of its evaluators. It recalled its review committee to meet at 10:00 a.m. on April 10, 1985, to review the scoring by Evaluator 2 given to IBM for factor 5 of the bid. The maximum of points allowed for factor 5 was 10, but IBM had received a total of 13.59 for factor 5. Evaluator 2 advised that an error had been made and she corrected her point total for factor 5 to reflect 10 points. (NB 118) The overall point total for IBM was revised to reflect this reduction; IBM retained its number one ranking.

FINDINGS OF FACT

I. The Evaluation Process

The responses to the District's solicitation for bids on Project #8485-29 were opened on March 27, 1985. There were nineteen responses. At that time three bids were rejected for non-compliance with the bid instructions and six responses contained no bid; another company was rejected for being late. Nine bids were

tabulated. (Sperry Exh. 1) On March 29 the evaluators' committee held its first meeting and reviewed the bids for compliance with hardware specifications. Four vendors, IBM, Sperry, Tandy and Intertec, complied with the hardware specifications and the committee adjourned to evaluate the bids of these four individually. (Transcript 248).

The committee met again on April 2 to clarify any questions a member might have and determine if demonstrations would be required of the four vendors being evaluated. The demonstrations were scheduled for April 4. On April 8 the committee met to turn over its individual evaluations to Mr. Porter, District Director of Purchasing. (Transcript 249-50)

According to Ms. Hawkins' testimony the evaluation process and the choice of evaluators was designed to provide the District a means to select the best educational product, not merely the lowest bid on these computers. (Transcript 233-47). The evaluators were chosen for their experience and judgment to review the materials supplied by the vendors and the demonstrations, then to rank the vendors on the evaluation criteria exercising their professional judgment. (Id.)

A comparison of the Bid Tabulation forms (Sperry Exh. #2) indicates a significant disparity between the scores given by three of the evaluators and the remaining Evaluator, No. 2. (See comments of Evaluator 4, Transcript 278) A breakdown of these numerical evaluation totals illustrates the disparity. For Tandy, Evaluator 1 awarded an 80, 2 awarded 56.71, 3 awarded a 77, and 4 awarded a

81.25. The average of Evaluators 1, 3, and 4 is 79.42. Evaluator 2 awarded a score 22.71 points below the average of the other evaluators.

For Intertec, Evaluator 1 awarded a 76.40, 2 awarded a 56.20, 3 awarded a 91.93, and 4 awarded a 77.99. The average of evaluators 1,3, and 4 is 82.11. Evaluator 2 awarded a score 25.91 points below the average of the other evaluators.

For Sperry, Evaluator 1 awarded a 95.80, 2 awarded a 66.38, 3 awarded a 95.97, and 4 awarded an 86.96. The average of evaluators 1, 3, and 4 is 92.91. Evaluator 2 awarded a score 26.53 points below the average of the other evaluators.

For IBM, Evaluator 1 awarded a 95, 2 awarded a 92.79, 3 an 87.50, and 4 an 89.21. The average of evaluators 1, 3, and 4 is 90.57. Evaluator 2 awarded a score 2.22 points above the average of the other evaluators.

In written communication, both on the evaluation sheets (NB 176-83; 224-231) and by separate letter, Evaluator 2 indicated a decided preference for IBM and based her evaluation of the other vendors on factors not listed in the request for bids from the District. On April 8, the day the evaluations were tallied, Evaluator 2 gave to Dr. Stevenson, the Deputy Superintendent in charge of this procurement, and Mr. Porter, the District's Director of Purchasing, a letter as follows:

> I again support the recommendation to purchse the IBM Computer and the IBM Wheelwriter III printer. (I feel my recommendations probably should have more weight possibly than members who work strictly in office situations. This stand is based on my business world work experience, education, and actual work

experience with the schools and students.) The following are the additional comments which I feel I must make as a committee member, a teacher, and coordinator of the vocational programs:

1. The equipment should be the best insofar as durability, smoothiness (sic) of operation, and longevity. My constant movement in and out of the classrooms everyday allows me to be aware of the intangible and tangible requirements made on teachers more than warrants (sic) a situation which will guarantee the teacher and students a working environment with equipment that is durable, runs smoothly, and operates efficiently -- that is with no "juggling and pulling" of plugs repeatedly!!

2. IBM has a staff of persons trained in "education and business". These people have worked with our teachers for many years. They (IBM) have participated in meetings, programs, seminars, conventions, constantly taking part in educating our teachers. Just recently (see attached), IBM provided a leader for a hands-on workshop at our Southern Business Education Association held at Hilton Head Island. Business Education has four meetings a year (local, state, regional) and IBM personnel have participated for many, many years. IBM has also participated in the Vocational Directors conventions on numerous occasions. Where has Sperry, (sic) and others been during these times? Does Sperry personnel (sic) and others know or will they meet the needs of our teachers and students?

3) IBM has been there responding to telephone calls to get information for education of our teachers and students.

4) Software. IBM has worked constantly with Business Education publishers such as Southwestern, Prentice Hall, to develop materials for business applications in the areas of Data Processing, Word Processing, Office Procedures, Accounting I & II, and so forth. Where have other companies been?

5) Future existence of company? Information gathered through business section of newspapers and magazines indicates the IBM company will be around for a long time!!"

(Emphasis in the original, NB 34)

Evaluator 2 noted on her evaluation form (NB 22) that Sperry was "never seen at any local, state, or national meeting." No information on participation in educators' meetings was requested in the solicitation, but evaluator 2 obviously took this into consideration in her evaluation.

In addition, on NB 224, evaluator 2's bid evaluation form for Sperry has the notations "How often have they contacted schools? Never" and "Any effort to educate teachers? No". There is no explanation of what attempts, if any, were made to secure this information from all bidders. This information was not requested from bidders and was not listed in the evaluation factors or the bid evaluation form.

Evaluator 2 based her judgment as to Factors 3, 4, and 5 of the evaluation criteria on personal knowledge of events in which IBM had participated. No other vendor was requested to specify as to factors 3, 4, and 5 whether he had participated in similar programs or program development. (Transcript 83-85; 291)

Both protestants, Sperry and Tandy, testified as to the educational personnel and participation supported by their respective companies. (Transcript 26-30, 82-88). Thus, had the District solicited this information, the protestants could have provided it for comparison to IBM. Evaluator 2 judged the other vendors by the standards she felt IBM met even though there is no concrete evidence alleged or available on which to base this judgment. Evaluator 4 restricted her consideration to materials furnished with the vendor's proposal (Transcript 327). Evaluators 4, 1, & 3 were substantially similar in their ratings of vendors.

II. The Type of Solicitation

The District called Bid #8485-29 a Request for Bids. The S.C. Consolidated Procurement Code, Title 11, Chapter 35, Article 5, S.C.

Code Ann. (1976 & Cum. Supp.) makes distinctions between the treatment of requests for proposals and bids. A bid is awarded on the basis of price alone, the low bidder who is responsible and responsive receives the award. In a request for proposal the price is one of many factors to be considered in determining the most advantageous proposal. The District referred to this matter as a Request for Bid (District Exh. #1 at 2) as well as a Bid Proposal (Id. at 3). The bids were opened on March 27, 1985, prices were announced and proposals were then subjected to further review and evaluation by the four person committee prior to award of the contract.

The District did only one thing that was consistent with terming Bid #8584-20 a "bid." It announced the bottomline figures of each proposal on bid opening day. (Transcript 36, 191) In all other aspects of its process of award the District appears to have treated the solicitation as a request for proposals. And further there was apparently no misunderstanding of this intended treatment by the two protestants Tandy (Transcript 48-50) and Sperry (Transcript 88-89).

Consistent with a request for proposal, the District set up a procedure to communicate with vendors whose bids were being considered. (Transcript 115-16; 306) The District apparently requested further information only from IBM. (NB 51-55, IBM response) The evaluation process itself is the prime indicator that this solicitation was a request for proposals rather than a competitive sealed bid.

The Panel finds that this soliciation was a competitive sealed proposal. The proposals were to be opened on March 27, 1985, but award of the contract was to be made only after the evaluators had an opportunity to subject the proposals to the bid evaluation factors as set forth in the request for proposal.

DISCUSSION OF THE LAW

I. The Evaluation Process

Section 11-35-1530(7) provides that "Award shall be made to the responsive offeror whose proposal is determined in writing to be the most advantageous to the State, taking into consideration price and the evaluation factors set forth in the request for proposals. No other factors or criteria shall be used in evaluation (emphasis added) and there shall be adherence to any weightings specified for each factor in the request for proposals. The contract file shall contain the basis on which the award is made and be sufficient to satisfy external audit."

Section 11-35-20 sets forth the purpose and policies of the S.C. Consolidated Procurement Code. Among these purposes and policies are: 1) To require the adoption of competitive procurement laws and practice by units of state and local governments; 2) To promote increased public confidence in the procedures followed in public procurement; 3) to ensure the fair and equitable treatment of all persons who deal with the procurement system of this State; 4) to

provide increased economy in state procurement activities and to maximize to the fullest extent practicable the purchasing values of funds of the State; 5) to foster effective broad-based competition for public procurement within the free enterprise system; and 6) to provide safeguards for the maintenance of a procurement system of regularity and integrity with clearly defined rules for ethical behavior on the part of all persons engaged in the public procurement process. Section 11-35-20(c)(d)(e)(f)(g)&(h) S.C. Code Ann. (1976 & Cum. Supp.)

To allow an evaluator to utilize factors outside those set forth in the bid proposal violates the requirements, the stated purposes and the policies of the Procurement Code. The use by Evaluator 2 of factors outside of those stated in the solicitation is forbidden by the statute and indicates a predetermination in the mind of Evaluator 2 to select IBM rather than to weigh the relative merits of each proposal.

Courts in considering bias, of administrative agencies have adopted a rule that prior consideration or possible bias is not fatal to the due process rights of a party. To impair due process which is often characterized as fairness to all parties, the administrative agency must be "so biased by prejudgment [or] pecuniary interest that it could not constitutionally conduct hearings." First American Bank & Trust Co. v. Ellwein, 221 N.W. 2d 509, 512 (N.D. 1974) construing, Gibson v. Berryhill, 411 U.S. 564 (1973); accord, Withrow v. Larkin, 421 U.S. 35, 46-51 and n. 16 (1975). As cited in note 16 of Withrow, bias has been found in a

member's speeches or in the signing of a brief, actions analogous to the letter and comments of Evaluator 2 as actions indictive of a predetermination.

II. Type of Solicitation

Counsel for the District, IBM, and Sperry contend that this solicitation was a competitive sealed proposal as described in Section 11-35-1530. Counsel for Tandy contends that this was a competitive sealed bid as described in Section 11-35-1520. The Panel finds that this solicitation was a competitive sealed proposal, for the reasons outlined previously.

Because the Panel finds that the solicitation was a request for proposals it does not find the communication between the vendors and the District objectionable. The purpose of the communication was "to assure full understanding of, and responsiveness to the solicitation requirements." Section 11-35-1530(6). Offerors seem to have been "accorded fair and equal treatment" (Id.) insofar as the communication with IBM, Sperry, Tandy did not result in a substantial change in the quantity or capability of any vendors' proposed equipment such that if similar information were solicited from other vendors it would have changed their dollar figures for proposals. (NB 31, 51-55; Sperry Exh. 3)

III. Jurisdiction

The parties disagreed as to the application of Act 109 (1985), an amendment to Section 11-35-4410 of the Code to this proceeding. The Panel has jurisdiction of this matter under the provisions of Act 493 (1984) and Act 109 (1985), an amendment to Act 493.

Counsel for the District and IBM assert that it is the act of publication of a District's expenditures that is the prerequisite to coverage of a school district under the Procurement Code pursuant to Act 493 (1984). To construe the statute in such a manner would allow a printer to determine the application of a statute to class of political subdivisions. This is ludicrous and makes a mockery of the legislative intent to require adherence to the Code for large school districts. It is the determination of expenditures by the District which is the trigger for coverage. The District was aware that its figures exceeded $75 million when it prepared its audited report in October of 1984 and submitted it to the State Superintendent of Education for publication in his annual report.

In Section 1 of Act 109 of 1985 the General Assembly amended Act 493 (1984) to clarify its original intention. The reference to publication was deleted. School Districts are required to "notify the Director of General Services of its expenditures within 90 days after the close of its fiscal year." This amendment clarifies the previous and continuing intention of the General Assembly that when expenditures exceed seventy-five million dollars a District's procurement is governed by the Consolidated Procurement Code. Title

11, Chapter 35, S.C. Code Ann. (1976 & Cum. Supp.) To require the act of publication to invoke jurisdiction would be contrary to the spirit and to the intent of the law.

Alternatively, the District and IBM argue that the approval of the District's own procurement procedures by the Director of General Services in a letter dated June 18, 1985, divests the Panel of any jurisdiction in this matter. The Panel cannot, without having the issue squarely before it, rule on the correctness of the Director's decision. However, the Panel has based its jurisdiction on events antecedent to the Director's approval and entertains in this protest a contractual matter executed prior to June 18, and protested prior to June 18. From the filing of the protest the protestants have a vested interest in the procedures in place for their redress. The time periods have run on their right of protest and they have no right at this stage of their protest to enter any other forum. To divest this forum of jurisdiction results in the denial of any remedy to these protestants.

IV. Remedy

Section 2 of Act 109 (1985) amended Section 11-35-4410 of the Procurement Code to provide that the Panel could provide certain relief to bidders that had heretofore been available only from the Budget & Control Board. The Circuit Court in Logan Construction Co. v. Leatherman, et. al., Doc. No. 85-CP-40-3047 (Aug. 1, 1985), held that this section of Act 109 was remedial and therefore retrospective.

A curative or remedial statute is one passed to cure defects in prior law, or to validate legal proceedings, instruments or acts of public and private administrative authorities which, in the absence of such an act, would be void for want of conformity with existing legal requirements but which would have been valid if the statute had so provided at the time of enactment. It is evident that the 1985 Procurement Code amendments are curative or remedial. The statutes were amended to cure the defects that were made apparent by the order of the South Carolina Supreme Court in Ex parte S.C. Division of General Services, ___ S.C. ___, 325 S.E.2d 319 (1984), with regard to the powers and duties of the Procurement Review Panel.

Remedial or procedural statutes are generally held to operate retrospectively. Hercules Inc. v. South Carolina Tax Commission, 262 S.E. 2nd 45 (1980). The only exception is where application of such statutes would impair the obligations of contract or vested rights. Under Act 109 (1985) the Panel has the power to reaward the contract or require the District to have bids resubmitted in addition to other relief, if it so orders. In the exercise of its powers, the Panel must consider the hardships placed on the District, the vendors and innocent third parties such as the teachers and students in fashioning a remedy.

School will commence shortly and with the final educational program the contract will be fully executed. These computers have already been installed. Ordering a reaward or a rebid of the contract, although within the Panel's powers where justified, would be too harsh remedy to impose on teachers and students and would

expose the District to the risk of dual payments for full execution by two vendors.

However, money appropriated by the State for computers for vocational education has been spent in a manner which violates the Code and a remedy which recognizes this while balancing the equities can be fashioned. The District could have used these funds, improperly spent with one vendor, to buy additional computers or other types of hardware or materials for career education. (Transcript 322)

CONCLUSIONS OF LAW

1) S.C. Code Ann. (1976 and Cum. Supp. 1984), Section 11-35-1530, Act 493 (1984) and Act 109 (1985) apply to this solicitation.

2) S.C. Code Ann. (1976 and Cum. Supp. 1984), Section 11-35-1530(7) requires that: "Award shall be made to the responsive offeror whose proposal is determined in writing to be the most advantageous to the State, taking into consideration price and the evaluation factors set forth in the request for proposals. No other factors or criteria shall be used in evaluation and there shall be adherence to any weightings specified for each factor in the request for proposals. The contract file shall contain the basis on which the award is made and be sufficient to satisfy external audit."

3) A consideration of factors outside those listed in the Request for Proposal is inequitable, improper and violates Section 11-35-1530(7).

4) Bias is an "inclination, bent, prepossession; a preconceived opinion; a predisposition to decide a cause or an issue in a certain way, which does not leave the mind perfectly open to conviction. [It is a] [c]ondition of mind, which sways judgment and renders a judge unable to exercise his functions impartially in particular case." (Black's Law Dictionary, 5th Edition)

5) Evaluator 2 considered factors outside of those listed in the request for proposal in violation of Section 11-35-1530(7). Such consideration resulted in bias precluding fair judgment of all vendors in the evaluation process.

6) Vendors, pursuant to the stated policies and purposes of the Procurement Code, are entitled to have their response to solicitations evaluated by persons who are impartial, not biased or prejudiced, or predisposed to favor any vendor over others.

7) In dealing with the expenditure of public funds the procedure must not only be fair but the appearance of complete fairness must be present. Wall v. American Optometric Association, Inc., 379 F. Supp. 175 (1974) The purpose of the Code is "to ensure the fair and equitable treatment of all" vendors and to maintain "a procurement

system of regularity and integrity." S.C. Code Ann. Section 11-35-20(e)(h) (1976 & Cum. Supp.)

8) IBM received the award of this contract as a result of the bias exhibited by Evaluator 2 and this evaluator's consideration of factors outside of those listed in the request for proposal. Protestant Sperry should have been awarded the contract.

IT IS ORDERED that Richland County School District #1 pay over to the EIA Fund of the State the amount of $18,266.65 less bid preparation costs to be paid to Sperry. This amount represents the difference between the state grants to the District for vocational education under the EIA of $208,366.00 and the proposal of Sperry at $190,099.35.

It is further ordered that Sperry will submit these costs to the Panel for consideration. The Panel retains jurisdiction of this matter to consider these costs and to order any additional reimbursement to Sperry of costs not to exceed $18,266.65 which it may find to be in the interests of justice.

THE SOUTH CAROLINA
PROCUREMENT REVIEW PANEL

Hugh K. Leatherman, Sr.
Chairman

August 14, 1985

STATE OF SOUTH CAROLINA)	BEFORE THE SOUTH CAROLINA
)	PROCUREMENT REVIEW PANEL
COUNTY OF RICHLAND)	CASE NO. 1985-2

IN RE:)
)
PROTEST BY SPERRY-RAND CORPORATION) O R D E R
AND TANDY CORPORATION)
)

INTRODUCTION

This order is pursuant to a motion for attorney's fees and bid preparation costs in the above referenced protest. The Panel retained jurisdiction in its order of August 14, 1985, to order such costs as Sperry might prove pursuant to §11-35-4210 S.C. Code Ann (1976) as amended by Act 109 of 1985.

A hearing was set for the determination of costs on September 10, 1985. The documentation was submitted as to bid preparation costs and attorney's fees. The testimony and documents were insufficient for the Panel to make a determination on the motion at that time and further evidence was requested to be submitted within 30 days. (Transcript of Proceedings 9/10/85, p. 22) The Panel reserved the question whether attorney fees would be awarded and requested further documentation on the request for bid preparation costs.

By letter of October 7, 1985, attorneys for Sperry Corporation submitted further documentation of the bid preparation costs. By the Panel's letter of October 15, 1985, these documents were transmitted to counsel for the School

District for comment. Counsel for the District responded by letter of October 24, 1985. The School District continued its opposition to any award of attorney fees and raised certain factual questions as to the costs submitted by Sperry.

The Panel held a hearing on the matter on December 16, 1985, at which Sperry and the School District were represented by counsel. Counsel for the District reiterated its position as stated in the letter of October 24 but eschewed any cross-examination and placed its reliance on the Panel's examination of the petition for costs. At the hearing the Panel requested further documentation, specifically affidavits to support the time sheets filed earlier, stating the relationship of the activity on the time sheets to bid no. 8485-29. (Transcript of Proceedings 12/16/85, p. 10-12)

By letter of January 14, 1986, the Panel made further specific requests for authentication and explanation of Sperry's bid preparation costs as previously submitted. (See attachment) To date no response has been received.

FINDINGS OF FACT

1) The Panel has made numerous efforts to obtain sufficient information to determine the merits of Sperry's petition for attorney fees and bid preparation costs in this matter.

2) The information submitted to the Panel is insufficient to determine the award of bid preparation costs because it is conflicting and ambiguous.

3) Information requested has not been submitted to support the request for bid preparation costs.

4) Information has been submitted to support the request for attorney's fees in this protest.

5) The information submitted to determine attorney's fees is clear and concise. It relates to the tasks associated with this protest both in time and in subject matter.

CONCLUSIONS OF LAW

1) The Panel has the authority under §11-35-4210, S.C. Code Ann (1976) as amended to award "reimbursement of bid preparation costs and may order such other and further relief as justice dictates." Paddock Construction Co. v. U.S.C., Davis Adv. Sheets, p. 25, June 28, 1986, Court of Appeals.

2) The information in support of the request for bid preparation costs is so conflicting and ambiguous that it is impossible for the Panel to determine a cost to Sperry for the preparation of this bid. Acknowledging that a bidder does not usually keep records specific to a particular bid, the Panel must however require authentication and explanation beyond the mere assertion that all persons' - secretaries, middle managers, vice-presidents - time on the project is valued at the same rate. Further, the Panel must require allocation of an employee's time in a day to this project when the individual's time records clearly indicate involvement with individuals not part of this bid.

3) The fees charged are reasonable in this area of South Carolina for the experience of the attorney and the complexity of the issues involved. The issue of bias in the evaluation procedure is a novel issue in South Carolina. Counsel also argues a rule of statutory construction little used in this State.

4) In this case justice requires the award of attorney's fees because the protestant's willingness to pursue this case resulted in a ruling by the Panel on several issues of law not previously determined. Further, the determination of this case may provide an exemplar for other similarly situated aggrieved bidders.

IT IS THEREFORE ORDERED that Richland School District I reimburse Sperry Corporation $7,893.64 for its attorney fees in this matter and that the remainder of the $18,266.65 as determined in the Panel's order of August 14, 1985, shall be paid over to the General Fund of the State of South Carolina for inclusion in the funds of the Education Improvement Act to the extent practicable under law.

Hugh K. Leatherman, Sr.
Chairman
Procurement Review Panel

7-11-86, 1986

STATE OF SOUTH CAROLINA	)	BEFORE THE SOUTH CAROLINA PROCUREMENT REVIEW PANEL
	)	
COUNTY OF RICHLAND	)	CASE NO. 1985-4
IN RE:	)	
	)	
PROTEST BY HONEYWELL, INC.	)	O R D E R
	)	

INTRODUCTION

This matter is before the South Carolina Procurement Review Panel (hereinafter "Review Panel") for administrative review pursuant to South Carolina Code of Laws Sections 11-35-4210(5) and 11-35-4410(5) (1976, as amended) as a result of a Decision issued by the Chief Engineer and a request for a review of that Decision. A hearing was held on October 8, 1985. A quorum of the Panel was present. Honeywell, Johnson Controls and General Services were present and represented by counsel.

By letter of July 12, 1985, to the Chief Engineer, counsel for Honeywell stated:

> Pursuant to our conference of July 12, this is to confirm that the issues which Honeywell feels need to be resolved in connection with Johnson Controls' bid are as follows:
>
> 1. Whether or not the power of attorney from Johnson to David Jacobs, dated April 5, 1977, is "current" as that term is used in the Instructions to Bidders (Section 4.1.7);
>
> 2. Whether the power of attorney issued by Safeco dated September 2, 1976, is "current" as that term is used in the Instructions to Bidders (Section 7.2.3);

3. If the power of attorney submitted in connection with the bid is not current, does that fact invalidate Johnson's bid or render it unresponsive;

4. If the Safeco power of attorney is not current, does that fact render the bonds invalid and, therefore, Johnson's bid unresponsive.

I believe that this letter incorporates and summarizes the various questions we have raised concerning Johnson's bid. You have previously advised us that you do not consider the fact that Johnson's duplicate bid bond was incomplete to be an issue which needs to be addressed.

On July 31, 1985, a hearing was held by the Chief Engineer. Honeywell and Johnson Controls were present and represented by counsel. The Chief Engineer's decision is dated August 9, 1985. He found Johnson Controls to be the lowest apparent responsive bidder having confirmed "the validity of the bid bond and it's power of attorney ... by the surety, SAFECO, by letter dated June 21, 1985, and by notarized statement by Kenneth J. Kammeraad of Johnson Controls, Inc."

The letter of protest to the Panel, dated August 19, 1985, from counsel for Honeywell raises two grounds of protest: 1) that the powers of attorney from Johnson Controls to David Jacobs dated April 5, 1977, and from SAFECO dated September 2, 1976, are not "current" as required by the instructions to bidders Subsection 4.1.7 and 7.2.3, and; 2) that the duplicate bid bond was blank. By way of response, attorneys for Johnson Controls raise as a defense that the protest is not timely.

FACTS

The bid involved in this protest is for an energy monitoring and control system to be installed at the Medical University of S.C. The bid date on the project was April 24, 1985. At bid opening on that date Honeywell was the low bidder. By letter dated May 10, 1985, the Chief Engineer, John McPherson rejected all bids pursuant to paragraph 5.2.1 of the Instructions to Bidders. The project was reworked substantially and rebid with the bid opening set for June 12, 1985. At that bid opening Johnson Controls was the low bidder.

Johnson submitted its bid in duplicate as provided in the instructions to bidders. (Page 1 of Bid Form) The bid opened on June 12 contained a blank bid bond. On June 13, Bruce Carlson, an officer of Honeywell, by letter to the Chief Engineer, protested the acceptance of Johnson's bid for this reason. By letter of June 18, 1985 the Chief Engineer ruled:

> When Johnson Controls' bid was opened, the copy read at the time and date set for opening was one in which the Bid Bond (Safeco Form S-54 R6 11/73) was not filled out showing the name of the Obligee or the sum of the principal of the bond. This discrepancy was so mentioned by the representative of the State Engineer's Office.
>
> Later, upon further examination by a representative of the Architect of all bid forms submitted, it was determined that the duplicate bid form submitted by Johnson Controls contained a valid and properly executed Bid Bond (see copy attached).
>
> Based on the above, as Chief Procurement Officer for Construction, I have determined that the bid submitted by Johnson Controls is the apparent lowest responsive bidder.

By letter of June 20, 1985, to the Chief Engineer, counsel

for Honeywell raised an additional ground of protest: that Section 4.1.7. of Instructions to Bidders had been violated. This provision required that the person executing the bonds of the surety attach a "current copy of his power of attorney. Mr. Jacobs executed Johnson's bid bond as attorney-in-fact on behalf of Johnson, obviously, since he was not the corporate insurance manager of Johnson at the time the bid was submitted, the power of attorney is not current."[1]

Subsequent to Honeywell's questioning of the surety's bond and powers of attorney, the Chief Engineer inquired of Johnson Controls and its suretys whether they would honor these bonds and powers of attorney. By various letters the answers were affirmative: 1) letter of July 17, 1985, from Bridgeford, Manager of Corporate Risk, Johnson Controls, to McPherson stating that power of attorney to Jacobs "still in full force effect;" 2) letter of June 17, 1985, from Smith of Safeco Insurance Company to von Kolnitz (MUSC) stating that bid bond executed April 24, 1985, "still valid for the June 12th date;" 3) letter of June 21, 1985 from Ortbal of Safeco Insurance Company to McPherson stating that bid bond executed April 24, 1985, "remains in full force and effect;" 4) letter of June

[1] By letter of June 25, counsel for Honeywell corrected its reference to the bid instructions, this quote reflects the corrected statement.

27, 1985, from Bridgeford, Manager of Corporate Risk, Johnson Controls, to McPherson, stating "the Power of Attorney granted to David Jacobs is still in full force and effect."

Mr. Al Johnson, President of R. M. Crawford Co. of the South and an insurance broker with more than 30 years experience in the area of surety bonds, testified as to his experience with bonds and powers of attorney in this business specialty. He stated that powers of attorney in this industry are valid until revoked or until the issuing authority requests their return. Surety companies, in his experience, operate in one of two ways with their clients. They may operate through insurance agents like himself granting them powers of attorney to bind the surety or they may operate without a middleman granting the power to bind them to an agent of the bidder. This latter was the method used by Johnson Controls. In either case, according to Mr. Johnson, it is the practice of the industry to give to its agents, whether the bidder's employee or an insurance agent, blank bonds and powers of attorney. These are used as needed until exhausted, revoked, or recalled.

DISCUSSION OF THE LAW

TIMELINESS OF APPEAL

The appeal of Honeywell has been timely made. Honeywell, as the apparent low bidder on April 24, 1985, had no grounds to make a protest as to the bonds, suretys and powers of attorney of the remaining bidders. It is axiomatic that the successful bidder does not have grounds on which to protest the bids of

unsuccessful bidders. Having found itself at bid opening to be the lowest bidder, Honeywell had no reason to protest unless the owner disqualified it and found another bidder to be the lowest responsive and responsible bidder. Section 11-35-1520(10) S.C. Code Ann. (1984 Cum. Supp.)

COMPLIANCE WITH INSTRUCTIONS TO BIDDERS

The instructions to bidders allow submission of duplicate bids. It is not required. Johnson Controls submitted two copies, Honeywell only one. A blank bond, like a blank or missed sheet of paper in a copy, is not a defect rendering the bid incomplete when only one copy is required. This is a mere technicality and within the judgment of the Chief Engineer to determine waiver. The other copy had a signed bid bond. It indicated "the bidder's intention to be bound by the unsigned bid document." Reg. 19-445.2080(3)

The instructions to bidders required a "current" power of attorney and bond. The testimony was uncontroverted that powers of attorney and bonds are, in this area of business, valid until revoked or recalled.

There is no question that this power of attorney is "presently enforceable." This fact has been clearly established and was not questioned by the protestant. The State, in the instructions to bidders, has no interest in the newness or recency of an otherwise "presently enforceable" power of attorney. See, Naylor v. Gutteridge, 430 S.W. 2d 726, 733 (1968).

The relation of principal and agent can only be terminated by act or agreement of the parties to the agency or by operation of law. 3 Am. Jur. 2d "Agency", Section 44. In South Carolina, where agency is of no fixed duration, it may be ended by the principal at any time, but it requires an affirmative act on the principal's part. See, e.g. Hancock v. Nat'l Council Jr. Order United Amer. Mechanics, 180 S.C. 518, 186 S.E. 538 (1936); Moore v. Pilot Life Ins. Co., 205 S.C. 474, 32 S.E. 2d 757 (1945); Fochtman v. Clanton's Auto Auction Sales, 233 S.C. 581, 106 S.E. 2d 272 (1954). Therefore, because no duration was set in the powers of attorney in question, and there has been no act by Safeco Insurance Company to severe the relationship communicated to the State, the power of attorney is still enforceable, and the age of the relationship has no bearing on the "currentness" of the power of attorney.

CONCLUSIONS OF LAW

1) This appeal was timely under the provisions of Chapter 35 of Title 11, S.C. Code Ann. (1976 & Cum. Supp.)

2) The Chief Engineer properly exercised his discretion to waive a minor irregularity in the form of a bid as submitted. Reg. 19-445. 2080, S.C. Code Ann. (1976 & Cum. Supp.)

3) The requirement of a current power of attorney in the bid instructions was properly interpreted by the Chief Engineer to mean presently valid and enforceable.

THEREFORE, the Panel affirms the decision of the Chief Engineer that Johnson Controls is the lowest responsive and responsible bidder on this project.

Senator Hugh K. Leatherman, Sr.
Chairman, South Carolina
Procurment Review Panel

10/23/85
Date

STATE OF SOUTH CAROLINA	)	BEFORE THE SOUTH CAROLINA PROCUREMENT REVIEW PANEL
	)	
COUNTY OF RICHLAND	)	CASE NO. 1985-5

IN RE:	)	
	)	
PROTEST BY CHARLESTON COUNTY SCHOOL DISTRICT	)	O R D E R
	)	

JURISDICTION

This protest arises under S.C. Code Ann. Section 11-35-70, as amended by Act 493 (1984), and Section 11-35-4410(1) (1976 & Cum. Supp.) Both parties agreed that the case was properly before the S.C. Procurement Review Panel, (hereinafter the Panel) as a hearing by the Panel promotes the purposes of the S.C. Consolidated Procurement Code (hereinafter CPC) promotes consistency in procurement policies and complies with the doctrine of administrative exhaustion.

The first purpose of the CPC set forth at 11-35-20 is "to consolidate ... the law governing procurement by this state. The Panel, to accomplish this goal, must take jurisdiction of an "inter-agency" procurement dispute just as it would with a bidder protest against an agency. To do otherwise places the bidder group of procurement cases under the grievance channels of Article 17 of the Code while the interagency group would have to be raised by means of court injunction. Such divergence would defeat the purpose of the CPC and undermine the purposes of the broad jurisdiction granted to the Panel by S.C. Code Section 11-35-4410(1) (1976 & Cum. Supp.).

The Charleston County School District (hereinafter the District) protested the decision of General Services pursuant to S.C. Code Section 11-35-4410(1). That section provides:

> There is hereby created the South Carolina Procurement Review Panel (Review Panel) which shall be charged with the responsibility of providing an administrative review of formal protests of decisions arising from the solicitation and award of contracts, the debarment or suspension of a person from the consideration for award of a contract, a decision concerning the resolution of a contract or breach of contract controversy, or any other decision, policy or procedure arising from or concerning the expenditure of state funds for the procurement of any supplies, services, or construction procured in accordance with the provisions of this code and the ensuing regulations. (emphasis added).

The decision of General Services not to approve the small purchase limit of the District is a "decision ... arising from or concerning the expenditure of state funds for the procurement of any supplies, services, or construction." Pursuant to the clear, unambiguous language of Section 11-35-4410(1), the Panel has jurisdiction to provide an administrative hearing for the protest of the District. An unambiguous statute will be given effect according to the clear meaning of its language. Citizens and Southern Systems, Inc. v. S.C. Tax Commission, 280 S.C. 138, 311 S.E. 2d 717 (1984); Helfrich v. Brashington Sand & Gravel Co., 268 S.C. 236, 233 S.E. 2d 291 (1977). Words used in a statute are to be given their plain and ordinary meanings. Worthington v. Belcher, 274, S.C. 366, 264 S.E. 2d 148 (1980).

The circuit courts of South Carolina have recognized the broad powers granted to the Panel. In the case of Florence Crittenton Home v. South Carolina Procurement Review Panel and Senator Hugh K. Leatherman, Sr. (Case No. 84-CP-10-144), Judge John Hamilton Smith considered the scope of the Panel's jurisdiction. In that case Judge Smith ruled on the issue of whether the Panel could sua sponte review the decision of a hearing officer when none of the parties to the hearing had chosen to appeal the hearing officer's decision. Judge Smith held that "the Panel is not an appellate court, and the statute which creates it does not limit its authority in the way that an appellate court's review jurisdiction is usually limited." Judge Smith went on to comment that the "broad power of the Panel is further confirmed by Section 11-35-4410(1)". This provision thus authorizes the Panel ... to review any and all decisions related to procurements by the State."

Finally, the exercise of the Panel's jurisdiction is consonant with the policy behind the exhaustion of administrative remedies requirement in this State. In almost all instances, the exhaustion of administrative relief is a prerequisite to relief in a court of law or equity. Ex Parte Allstate Insurance Company, 248 S.C. 550, 151 S.E. 2d 849 (1966); Henderson v. Celebreeze, 239 F. Supp. 277 (D. S.C. 1965). This is not just a procedural rule, but rather a recognition of the fact that administrative review procedures,

unlike those of the judicial branch, may concentrate on specific areas of policy or practice of state agencies. The Panel is a specially-constituted entity which is uniquely capable of dealing with procurement policy. Unlike any court, it comprises representatives from government and industry, chosen for their expertise in procurement.

There is no question that the District is governed by the provisions of Act 493 of 1984 and continues to be so governed under the amendments, Act 109 of 1985.

Act 493 of 1984 provides:

> Notwithstanding any other provision of law, any school district whose budget of total revenues as shown in the most recently published annual report of the State Superintendent of Education exceeds seventy-five million dollars annually is subject to the provisions of Chapter 35 of Title 11, Code of Laws of South Carolina, 1976 (South Carolina Consolidated Procurement Code); provided, however, that <u>if a district has its own procurement code which is in the written opinion of the Division of General Services of the State Budget and Control Board substantially similar to the provisions of the South Carolina Consolidated Procurement Code, the district is exempt from the provisions of the South Carolina Consolidated Procurement Code</u> except for a procurement audit which shall be performed every three years by the Division of General Services. (emphasis added)

The amendments in 1985 do not alter Act 493 for the purposes of this protest.

The District has submitted proposed procurement regulations to General Services as is required by Act 493 (1984) as

amended. Included in those proposed regulations is a provision which provides that any purchase of less than $1,000.00 does not have to be bid competitively. General Services rejected this "small purchase limit" as not being "substantially similar" to the provisions of the CPC. The present regulations enacted pursuant to the CPC provide for a $500.00 limit on small purchases. Additionally, the two other school districts which have submitted procurement plans were required to utilize $500.00 as the small purchase limit. The School District, pursuant to S.C. Code Section 11-35-4410 (1976, as amended), has protested the decision of General Services not to approve the $1,000.00 small purchase limit.

PROCEDURAL HISTORY

The District submitted its procurement code for review by General Services on or about July 13, 1984. No testimony in the record indicates the actual date but the record contains a detailed response to the District's submission from Tony Ellis, Director of General Services, to Emory Haselden, Deputy Superintendent for Operations dated August 3, 1984. In a four page list, Mr. Ellis details those portions of the District's proposed code which he believes must be modified to obtain his department's certification that the District's procurement code is substantially similar to that of the State. Such

certification allows the Charleston School District to operate under its adopted Code rather than the CPC (Act 493, 1984; Act 109, 1985)

On September 26, 1984, the district protested the decision of General Services to deny it certification to operate under its own procurement code because its code included a small purchase limitation of $1,000.00. According to testimony at the hearing all other points raised in Mr. Ellis' letter of August 3, 1984, had been resolved to the satisfaction of both the District and General Services.

DISCUSSION

General Services has taken the position that the size of the small purchase limitation, the amount of the purchase below which competitive bidding is not required, is one of the prime elements insuring competition, fairness, and savings under the CPC. They further rely on the adoption, pursuant to the CPC, of a regulation, Budget and Control: 19-445.2100, setting a $500.00 maximum for state purchasing of secured without at least one competitive quotation. This regulation, printed below, has the force of law as to the operations of agencies required to operate under the CPC.

19-445.2100. Small Purchases and Other Simplified Purchasing Procedures.

A. Authority.

Any procurement under this Regulation not exceeding $2,499.99 may be made by governmental bodies provided, however, that procurement requirements shall not be artificially divided by governmental bodies so as to constitute a small purchase under this Subsection ...

B. Competition and Price Reasonableness.

(1) Purchases Not in Excess of $500.00. Small purchases not exceeding $500.00 may be accomplished without securing competitive quotations if the prices are considered to be reasonable. The purchasing officer shall annotate the purchase requisition: "Price is fair and reasonable" and sign. Such purchases shall be distributed equitably among qualified suppliers. When practical, a quotation will be solicited from other than the previous supplier prior to placing a repeat order. The administrative cost of verifying the reasonableness of the price of purchases "not in excess of" may more than offset potential savings in detecting instances of overpricing; therefore, action to verify the reasonableness of the price need be taken only when the procurement officer of the governmental body suspects that the price may not be reasonable, e.g., comparison to previous price paid, personal knowledge of the item involved.

2) Purchases from $500.01 to $1,499.99. Solicitations of verbal or written quotes from a minimum of two qualified sources of supply shall be made and documented that the procurement is to the advantage of the State, price and other factors considered, including the administrative cost of the purchase. Such documentation shall be attached to the purchase requisition.

3) Purchases from $1,500.00 to $2,499.99. Solicitation of written quotations from three qualified sources of supply shall be made and documented that the procurement is to the advantage of the State, price and other factors considered, including the administrative cost of the purchase. Such documentation shall be attached to the purchase requisition. When prices are solicited by telephone, the vendors shall be requested to furnish written evidence of their quotation.

The District has taken the position that they have up until this time operated with a small purchase limitation of $1,000.00. They argue that the increased scrutiny for purchases in excess of $500.00 but less than $1,000.00 will cost more than there is potential for savings in these purchases. They further argue that this one deviation in their Code as a whole, after modification at the request of General Services, is insufficient to cause their proposed code to fail the substantially similar test of Act 493 (1984), Act 109 (1985).

The District provided the following testimony in support of its position:

1) that the district was unaware of any complaints against its current use of the $1,000 small purchase limit by vendors.

2) that its annual audits reveal no purchasing problems.

3) that the district made 16,000 purchase orders per year of which 84% are under $500; approximately 2,200 are between $500-$1,000; and approximately 300 are above $1,000.00.

4) that under the current procedure 98% of the purchases [but not 98% of the dollars spent] take place without bidding.

5) that two persons operate the district's procurement office, both of them certified specialists in procurement.

6) that each of the 16,000 purchase orders is reviewed by one or both of these persons.

7) that orders above $1,000.00 or which appear "unreasonable" to the procurement specialist are subjected to more scrutiny, either calling for additional information or other bids or, in large purchases, publication of a solicitation for bids.

The record is devoid of information from which one could conclude that the costs of further scrutiny of purchases between $500 - $1,000 would be greater than the savings. No witness had studied whether an additional employee would be necessary in the procurement office. No witness had information as to the dollar value of purchases less than $500 or falling between $500 and $1,000. The District offered no evidence: that adoption of the $500 limit on small purchases would be an onerous burden on present personnel; that it would require additional personnel; or that it would result in lower efficiency and greater cost for purchases.

The Panel recognizes that Act 493 (1984) as amended requires of the District only substantial similarity, not identity, to the CPC. The small purchase limits are not merely procedural matters within the structure of the CPC but are the essence of its requirement for competitive bidding. A proposed procurement Code simply cannot be substantially similar if it deviates by 100% from the small purchase requirements adopted by the State in regulation 19-445.2100.

FINDINGS OF FACT

1) Charleston County School District is required to adopt a procurement code which in the opinion of General Services is substantially similar to the S.C. Consolidated Procurement Code or be governed by the CPC.

2) The District submitted a proposed code for its governance to the Division of General Services.

3) General Services has refused to certify the District's Code as substantially similar to the CPC because it has a $1,000 rather than a $500 small purchase limit.

4) The District has not presented evidence that compliance with the $500 limit will cost more than its potential savings.

CONCLUSIONS OF LAW

1) The requirements of price competition are the essence of the CPC. S.C. Code Ann. Section 11-35-20 (c), (g), (1976 Code & Cum. Supp.)

2) A regulation has the force of law except where it alters or adds to a statute, Soc. of Prof. Journalists v. Sexton, ____ S.C. ____, 324, S.E. 2d 313, 315 (1984).

3) The regulations concerning competitive pricing are an integral part of the Code. These neither alter nor add to the statutory authority to make purchases less than $2,500.00 without competitive sealed bidding. S.C. Code Ann. Section 11-35-1520(1) (1976 & Cum. Supp.)

4) To be "substantially similar" under Act 493 (1984) as amended a district's code must comply with the dollar limitations set out in 19-445.2100.

THEREFORE, the Panel finds that the District's proposed code is not substantially similar to the CPC. It is so ordered.

/s/
Hugh K. Leatherman
Chairman

January _____, 1986

proceeding that would substantially duplicate the one in question. With this analogy to permissive joinder, it seems clear the better rule is that permissive intervention should be allowed only where the prospective intervenor has a cause of action or defense it could bring or assert. Viewed in this light, the Commission could not become a party to suit where its claim or defense would be identical to the County Officers in the instant action.

The above view is strengthened by the interpretation of the requirements of Rule 24(b) by the federal courts. Federal courts have held that a party seeking permissive intervention under a discretionary right must establish a basis for federal subject matter jurisdiction independent of the court's jurisdiction over the underlying action. *E.E.O.C. v. Nevada Resort Association*, 792 F.2d 882 (9th Cir.1986); *Harris v. Amoco Production Co.*, 768 F.2d 669 (5th Cir 1985), *cert. denied; Amoco Production Co. v. Equal Employment Opportunity Commission*, 475 U.S. 1011, 106 S.Ct. 1186, 89 L.Ed.2d 302 (1986); *E.E.O.C. v. Boeing Co.*, 109 F.R.D. 6 (D.Wash.1985); *National Union Fire Insurance Co. of Pittsburg, Pa. v. Continental Illinois Corp.*, 113 F.R.D. 532 (D.Ill.1986) (permissive intervention differs from intervention as of right in that trial court does not have ancillary jurisdiction over intervenor's claim, and thus party seeking such intervention must establish an independent jurisdictional ground).

Accordingly, the trial court did not abuse its discretion in denying the Commission's motion to intervene under Rule 24(b).

AFFIRMED.

SHAW and GOOLSBY, JJ., concur.

CHARLESTON COUNTY SCHOOL DISTRICT, Appellant,

v.

Hugh LEATHERMAN, Luther Taylor, Grady L. Patterson, Jr., Nikki G. Setzler, Harriette G. Shaw, Steve Bilton, Jules J. Hesse, Jeffrey Rosenblum, as officers and members of the South Carolina Procurement Review Panel; South Carolina Procurement Review Panel; Governor Richard W. Riley, Grady L. Patterson, Jr., Earle E. Morris, Jr., Rembert C. Dennis, Tom G. Mangum, and William T. Putnam, as officers and members of the South Carolina Budget and Control Board, Division of General Services; and South Carolina Budget and Control Board, a Division of General Services, Respondents.

No. 1139.

Court of Appeals of South Carolina.

Heard March 21, 1988.

Decided April 11, 1988.

School district brought suit seeking reversal of administrative decision to deny approval of district's proposed procurement code. The Common Pleas Court, Richland County, Frank P. McGowan, Jr., J., affirmed denial, and district appealed. The Court of Appeals, Cureton, J., held that district's proposed code was not "substantially similar" to South Carolina's consolidated procurement code and could not be approved, where proposed code employed $1,000 small purchase limits while code's regulation employs $500 limit.

Affirmed.

Schools ⇐80(2)

School district's proposed procurement code was not "substantially similar" to South Carolina's consolidated procurement code and could not be approved, where proposed code employed $1,000 small purchase limit, below which bidding was not required, while consolidated procurement

code's regulation employs $500 limit; although code section requires a district's proposed code to be substantially similar to statutory provisions and does not mention the code's "regulations," it was consistent with legislative intent of providing system of competitive procurement laws that regulatory small purchase limit be applied to small purchases in district's proposed code. Code 1976, §§ 11-35-70, 11-35-1550; Code 1976, R 19-445.2100.

Daniel T. Brailsford, of Robinson, McFadden, Moore, Pope, Williams, Taylor & Brailsford, Columbia, for appellant.

William Hogan Brown, Helen T. McFadden, Atty. Gen. T. Travis Medlock and Asst. Atty. Gen. Charles W. Gambrell, Jr., Columbia, for respondents.

CURETON, Judge:

Charleston County School District appeals from the rejection of its proposed procurement code by the Division of General Services of the Budget and Control Board. The District submitted the proposed code to the Division of General Services for approval pursuant to *S.C.Code Ann.* Section 11-35-70 (1986). General Services did not approve the proposed code because it found the proposed code was not "substantially similar" to the South Carolina Consolidated Procurement Code (*S.C. Code Ann.* Sections 11-35-10 to -5270) due to the small purchase limit in the proposed code. This decision was affirmed by the South Carolina Procurement Review Panel. The School District filed a complaint in circuit court seeking a reversal of the decision of the Procurement Review Panel. The trial court affirmed the Review Panel. The District has appealed the decision of the circuit court. We affirm.

The record indicates General Services rejected the District's proposed procurement code because the One Thousand Dollar ($1,000) small purchase limit in it did not comply with the Five Hundred Dollar ($500) small purchase limit in Budget and Control Board Regulation 19-445.2100. The Panel held the regulations concerning competitive pricing were an integral part of the Consolidated Procurement Code. On appeal to the circuit court the District argued the Consolidated Procurement Code by its terms did not contain a $500 small purchase limit and the District was not required to comply with an administrative regulation on small purchase limits.

The appeal from the Panel to the circuit court was governed by the Administrative Procedure Act. *William C. Logan and Assoc. v. Leatherman*, 290 S.C. 400, 351 S.E.2d 146 (1986). The order of the Review Panel contained certain factual findings which do not appear to have been challenged in the circuit court and were not excepted to on appeal to this court. Specifically, the record indicates the District makes sixteen thousand (16,000) purchases per year of which eighty-four percent (84%) are under $500. Approximately 2200 purchases are between $500 and $1,000 and approximately 300 purchases are above $1,000. Under the current procedure 98% of the purchases take place without bidding because they fall under the $1,000 level. Two persons operate the District's procurement office and both are certified specialists in procurement. The District offered no evidence that adoption of a $500 limit on small purchases would be an onerous burden on present personnel. No evidence was presented that it would require more personnel or that the $500 limit would result in lower efficiency and greater cost for purchases.

The crux of the District's argument is that Section 11-35-70 requires the procurement code of the District to be substantially similar to the South Carolina Consolidated Procurement Code but not to the regulations promulgated under the Code. Section 11-35-70 utilizes the phrase "substantially similar to the provisions of the South Carolina Consolidated Procurement Code." The word "regulations" does not appear in the text of the section. *S.C.Code Ann.* Section 11-35-1550 (1986) deals with small purchases. It provides, in relevant part, that "[a]ny procurement not exceeding the dollar amounts established in regulation and updated periodically by the board may be made by governmental bodies in accordance with small purchase procedures promulgated by the board."

The primary rule of statutory construction requires that legislative intent must prevail if it can reasonably be discovered in the language used construed in light of the intended purpose. Additionally, sections which are part of the same general statutory law of the state should be construed together and each given effect if it can be done by any reasonable construction. *Smalls v. Weed*, 293 S.C. 364, 360 S.E.2d 531 (Ct.App.1987); *cf. Multi-Cinema Ltd. v. S.C. Tax Comm.*, 292 S.C. 411, 357 S.E. 2d 6 (1987).

Section 11-35-20 defines the purposes and policies of the South Carolina Consolidated Procurement Code. Subsections (c) and (g) point to the fundamental purpose of fostering competition for public procurement. This code section clearly specifies the legislative intent to provide a system of competitive procurement laws. Section 11-35-1520(1) states that contracts amounting to $2,500 or more shall be awarded by competitive sealed bidding except in certain specified situations. One of the specified situations is the small purchase area. *S.C. Code Ann.* Sections 11-35-1510(6) and 11-35-1550 (1986). As previously stated, Section 11-35-1550 regarding small purchases refers to adopted regulations and procedures although no specific dollar amounts are contained in the statute.

The parties agree Budget and Control Board Regulation 19-445.2100 was in effect when Section 11-35-70 was passed to include certain school districts within the application of the Consolidated Procurement Code. Previously, school districts were not subject to the CPC. *S.C. Code Ann.* Section 11-35-310(18) (1986). The legislature must be presumed to have been aware of Regulation 19-445.2100 and Section 11-35-1550 when Section 11-35-70 was passed.

It is consistent with the legislative intent of providing a system of competitive procurement laws that the small purchase limit in Regulation 19-445.2100 should be applied to small purchases in the proposed procurement code of the District. Under the facts of this case, a contrary determination would permit approximately 98% of the purchases of the District to escape the competitive procurement system. Further, the District has presented no evidence of prejudice to it by application of the limit.

The decision of the circuit court is AFFIRMED.

SHAW and GOOLSBY, JJ., concur.

PREFERRED SAVINGS AND LOAN ASSOCIATION, INC., Appellant,

v.

ROYAL GARDEN RESORT, INC., Royal Garden Regime Homeowners Association, a/k/a Royal Garden Resort Condominium Homeowners Association, Inc., Cianbro Corporation, Carolina Furniture Sales, Commercial Communications, Inc., General Electric Company, George S. Hirsch, Ward Hulbert, as Trustee for Hulbert, Inc., Profit-Sharing Trust, and Hulbert, Inc., Pension Plan, Kenneth R. Sanders, Robert H. Quattlebaum, Shirley Treadway, d/b/a S. & M. Lawn Services, Darlene M. Appel, Keith K. Appel, Patricia T. Burk, William J. Burk, Rebecca S. Howard, Whitfield M. Howard, Daniel B. Jordan, Marian M. Jordan, Etta M. Near, Jerome A. Near, Phyllis A. Stickney, Roland F. Stickney, Diana V. Stone, Gregory G. Stone, William H. Cooper, Jesse C. Atchley, Ralph Tom White, II, individually and as General Partners of Pintail Properties, a North Carolina General Partnership, and Robert Foster, Defendants,

of whom Cianbro Corporation is Respondent.

No. 1140.

Court of Appeals of South Carolina.

Heard Feb. 22, 1988.

Decided April 25, 1988.

General contractor's suit to enforce mechanic's lien on condominium project

The Supreme Court of South Carolina

CLYDE N. DAVIS, JR.
CLERK
BRENDA F. SHEALY
DEPUTY CLERK

P.O. BOX 11330
COLUMBIA, S.C. 29211
PHONE NO. 734-1080

November 17, 1988

Daniel T. Brailsford, Esquire
Messrs. Robinson, McFadden, Moore,
Pope, Williams, Taylor & Brailsford
P. O. Box 944
Columbia, South Carolina 29202

Re: Charleston County School District v. Hugh Leatherman, et al.

Dear Mrs. Brailsford:

The Court has issued the following Order on your Petition for Writ of Certiorari in the above entitled matter:

"Petition for Writ of Certiorari denied.

s/George T. Gregory, Jr. C.J.
For the Court

November 17, 1988."

By copy of this letter we are asking counsel of record what disposition they would have us make of the extra copy of the record in this action. If we have not heard from them to the contrary, we will destroy the record on November 28, 1988.

Very truly yours,

Brenda F. Shealy

DEPUTY CLERK

BFS/djp
cc: Helen T. McFadden, Esquire
William Hogan Brown, Esquire
The Honorable Charles W. Gambrell, Jr.
The Honorable Reba D. Mims
The Honorable Barbara Scott
West Publishing Company

STATE OF SOUTH CAROLINA	)	BEFORE THE SOUTH CAROLINA
	)	PROCUREMENT REVIEW PANEL
COUNTY OF RICHLAND	)	CASE NO. 1986-1

IN RE:)
)
PROTEST BY KAHN-LOCKWOOD, INC.) O R D E R
)

This matter is before the S.C. Procurement Review Panel (Panel pursuant to §§ 11-35-4410 and 11-35-4210, S.C. Code Ann. (1976, as amended). Kahn-Lockwood, Inc. (Kahn) timely filed a request for review of the decision of the Chief Engineer. The Chief Engineer had ruled Kahn's bid to be non-responsive because it did not contain the bid listing documents required by addendum 2. He ruled that the bid should be awarded to Moose Construction Company, the next lowest bidder.

All parties were given notice of the Panel's hearing. The Chief Engineer and Kahn were present and were represented by counsel. Moose Construction Company did not appear.

Kahn submitted its bid timely on January 7, 1986. At that time its bid did not contain the subcontractor listing sheet contained in addendum 2 to this project. Kahn presented this form to the Chief Engineer at the time of his hearing. At bid opening, Mr. Charles Crawford, architect on the project asked the bidders whether they had received the two addenda as the

bid form did not include a place to acknowledge receipt of the addenda. Mr. Crawford testified that he also asked each bidder to orally acknowledge receipt of the addenda as he opened that bidder's bid.

Bill Miller represented Kahn at the bid opening. He acknowledged receipt of the addenda on Kahn's behalf. He testified that he did not understand there were two addenda when he acknowledged receipt. He believed there was only one addendum and that he was acknowledging receipt of it.

The bid documents stated that addenda would not be distributed less than four days before the bid opening. Mr. Crawford prepared addendum 2 on Friday, January 3, 1986. It was completed in the afternoon and in the regular course of business should have been mailed that afternoon. There is no evidence that it was not. However, both Kahn and the State Engineer failed to receive the addendum prior to bid date January 7, 1986. Both received the addendum on January 8, after the bids were opened. The other bidders on this project did however, receive and include the bid listing sheet in addendum 2.

For whatever reason Kahn and the State Engineer did not receive copies of addendum 2 in a timely fashion. Neither could have used it to prepare for a bid opening at 2 p.m. on January 7, 1986.

The evidence as to acknowledgement of receipt of bids is ambiguous. The bid opening the State was opening and recording

bids on multiple projects. The bid under protest was not the only one. Addendum 2 was not, according to the testimony, a significant change to the project. It was an additional requirement for the listing of subcontractors. Kahn has shown itself ready to provide this information and in fact did so at the Chief Engineer's hearing.

Because the evidence shows the impossibility of performance in accordance with addendum 2 Kahn should not be penalized. Nor should the State reject the lowest bid where it has been shown that the failure to use the listing form in addendum 2 was not the result of Kahn's error or mistake but rather an inability to perform.

The Panel therefore, rules that Kahn's bid should be found to be responsive it having submitted the proper forms when these were made available to it.

IT IS SO ORDERED

Hugh K. Leatherman. Sr.

May 29th, 1986

STATE OF SOUTH CAROLINA	)	BEFORE THE SOUTH CAROLINA
	)	PROCUREMENT REVIEW PANEL
COUNTY OF RICHLAND	)	CASE NO. 1986-2
IN RE:	)	
	)	
PROTEST BY MEDIA GENERAL - CHARLESTON TELEVISION, INC.	)	O R D E R
	)	

This matter is before the Procurement Review Panel (Panel) pursuant to the authority granted under §§11-35-4210 and 11-35-4410, S.C. Code Ann. (1976 as amended). Media General timely filed a request for review of the decision of the Chief Procurement Officer. A hearing was held over four days and all parties were given opportunity to present their evidence.

A "Stipulation As To Parties" document was filed by S.C. Educational Television (ETV), Tall Tower, Inc. WCSC (TT/WCSC), Media General (MG), Budget & Control Board (BCB) and Division of General Services (DGS). (Joint Ex. 1) The result of this stipulation was that BCB and DGS were not parties to this protest. The parties to this protest are ETV, TT/WCSC and MG. The grounds for this protest as formulated by MG are:

1) Media General conformed in all material aspects to the terms requested by the Educational Television Commission.

2) Media General was the low bidder.

3) The award to Tall Tower, Inc. (WCSC) is void as the Commission did not comply with South Carolina Code of Laws §11-35-1590 and this provision provides that "no governmental body shall enter into any lease agreement or renew any existing lease except in accordance with the provisions of this section."

4) The award to Tall Tower, Inc. (WCSC) is null and void as South Carolina Code of Laws §11-35-1590 (3)(C) has not been met.

5) The South Carolina Code of Laws §11-35-1210 (3) requires that all procurements are subject to the appropriate provisions of the Code "especially regarding competitive procurement methods and non-restrictive specifications" and the requirement of this Section has not been met in the above-referenced matter, thus rendering the award to Tall Tower, Inc. (WSCS) null and void.

6) The rationale offered in support of the ETV Commission award regarding the technical orientation of the towers and cost of the two bids was based on incorrect and inaccurate information. Media General will present data and information from engineering and other experts to support this contention.

7) Any award and contract by the Educational Television Commission to Tall Tower, Inc. (WSCS) in this matter is null and void under the decision of Duncan v. Charleston 60 S.C. 532 (1901), at page 558, as Mr. John Rivers, Jr. is a member of the Educational Television Commission and is also the President and stockholder of Tall Tower, Inc.

8) The rationale offered in support of the ETV Commission's decision and the Budget and Control Board's ratification of that decision to award the lease to Tall Tower, Inc. includes the allegation that Media General's tower location would be more costly because of the orientation of the Media General tower towards Georgetown and the Pee Dee area as opposed to the orientation of the Tall Tower, Inc.'s tower towards Charleston (See attached Order of the Chief Procurement Officer of March 10, 1986 at pages 8-10).

This criteria was improperly considered by the Educational Television Commission and the Budget and Control Board for the reasons that:

a) Media General was never notified that the orientation of the tower was a factor upon which the ETV Commission would rely in its decision-making, let alone that it was the chief technical criteria upon which the proposals were judged.

b) If this criteria was properly a factor, Media General's tower orientation should have been evaluated as superior to Tall Tower, Inc.'s, in terms of cost and quality, because under all previous criteria adopted by the Educational Television Commission for the Charleston Tall Tower project, top priority was given to projecting a stronger signal to Georgetown and the Pee Dee area so as to avoid constructing another ETV tower in Georgetown. Media General's tower orientation gives a vastly superior signal to the Georgetown and Pee Dee area while offering a signal

to Charleston which well surpasses the criteria adopted by the Educational Television Commission for the Charleston market.

The relief requested by Media General is:

1) A re-award of the Educational Television Commission transmission tower lease to Media General.

2) If re-award to Media General is not granted, a re-bid of the ETV transmission tower lease.

3) Reimbursement of bid preparation costs and other costs associated with this grievance.

Letter of Protest to Chief Procurement Officer, Richard Campbell from Dwight Drake and Jean Toal, March 19, 1986.

The Panel, in rendering a decision, must render findings of fact and conclusions of law on each of the grounds of the protest.

I. THE CONDUCT OF MR. RIVERS (7)

The protestant in this proceeding presented no evidence to contradict the findings of fact or the conclusion of law of the Chief Procurement Officer (CPO) as to Mr. Rivers' actions in this matter. In fact persons participating in the negotiations for the State said flatly Mr. Rivers was not participating in ETV's judgments. (Tran. IV at 562, 588, 604 compare Mr. Rivers testimony VI at 1058-61; 1063, 1086). The Panel therefore adopts the findings and conclusions of the CPO as to Mr. Rivers' conduct.

In Article 7, §8-13-460 of the law governing rules of conduct, certain actions are required by public officials where a decision would affect his financial interest. These actions are as indicated below:

> Any public official or public employee who, in the discharge of his official duties, would be required to take action or make a decision which would substantially affect directly his personal financial interest or those of a member of his household, or a business with which he is associated, shall instead take the following actions.
>
> (a) Prepare a written statement describing the matter requiring action or decisions, and the nature of his potential conflict of interest with respect to such action or decision.
>
> (b) Not applicable.
>
> (c) ... If the public official is a member of the governing body of any agency, commission, board, or of any county, municipality, or other political subdivision, he shall furnish a copy to the presiding officer and to the members of that governing body, who shall cause such statement to be printed in the minutes and shall require that the member be excused from any votes, deliberations, and other actions on the matter on which the potential conflict of interest exists, and shall cause such disqualification and the reasons therefor to be noted in the minutes.

The CPO finds that Mr. John Rivers, member of the ETV Commission and President of TT/WCSC did abstain from voting on the budget request entitled "Special Item Request - $1,000,000" for the Charleston Tall Tower as defined in Stipulation Exhibit #4. It is also found that Mr. Rivers as defined in Stipulation Exhibit #11, did comply with §8-13-460(c) as previously defined.

The CPO finds that in those decisions concerning ETV's tower selection and subsequent recommendations to the BCB, Mr. Rivers was not in attendance and abstained from any voting on the matter. This is supported by Stipulation Exhibits #15, #16, and #32.

The CPO was not provided evidence of any other decisions made by Mr. Rivers which affected this contract. In decisions which involved the competitive negotiation of this lease, the CPO finds that Mr. John Rivers did not participate. The decision of ETV to recommend WCSC for the transmission towe lease did not include Mr. Rivers as a participant.

7. The laws governing rules of conduct for public officers, as defined in §8-13-460, were adhered to by Mr. John Rivers.

II. APPLICATION OF SECTION 11-35-1590 and 11-35-1210 TO THIS PROCUREMENT (3) (4) (5)

The protestant's argument here is an argument on the law. In its simplest form it is the allegation that because the Budget and Control Board has no regulation which purports to carry out the provisions of §11-35-1590(3)C that no lease contract entered under the provisions of §11-35-1590 is valid.

This question is currently being litigated by the identical parties in the Circuit Court, Charleston Television, Inc. v. S.C. Budget & Control Board, S.C. ETV, and Tall Tower, Inc., 86-CP-40-1233. The Court in that case has issued a temporary injunction. The defendants in the action have appealed to the South Carolina Supreme Court for a supersedeas.

It is inappropriate for the Panel to rule on an issue of law, not central to its determination, when that issue will be determined by the Courts.

No evidence and no argument was presented on the application of §11-35-1210 to this procurement. In fact all parties stipulated (#49 p. 12 of Stipulations) that ETV was not "certified" to do its own real estate leasing. The language cited by protestants requires agencies which are "certified" to comply with the Code as to "competitive procurement methods and non-restrictive specifications." Because ETV is not a "certified" agency under R. 19-445.2120 this Code Section is inapplicable.

THE AWARD OF THE CONTRACT (1) (2) (6) (8)

A. The Solicitation

ETV, during the period of the last sixteen years, has sought the availability of a transmitting facility in the Charleston vicinity to enhance their television and radio network capacity and quality. ETV pursued this objective in collaboration with MG, TT/WCSC and WCIV, Inc. (the third commercial station in Charleston) The stations encountered legal, administrative and regulatory obstacles which created lengthy delays and resulted in changed business circumstances.

During the course of time from 1967 to the present, ETV's anticipated role in this project changed from joint venturer to potential lessee. Although ETV's role changed, it continued to seek space on a transmitting tower to satisfy its long stated objective. This effort was conducted exclusively with the only known source - the joint venturers, all the Charleston stations, and their successors in interest - until a business disagreement between the parties of the joint tower venture caused a termination of their arrangement and changed the market conditions. (Tran. IV at 608-613, 618-19)

On July 19, 1985, by a copy of a correspondence between Jim Linen (MG) and John Rivers (TT/WCSC), ETV was advised of a potential new source to satisfy its transmission requirements. (See Stipulation Exhibit #6). On September 19, 1985, Mr. Peter E. Broadbent (MG) acknowledged ETV's desire to discuss leasing

space on MG's proposed transmission facility. (See Stipulation Exhibit #8.) On September 26, 1985, Mr. James W. Rion, Office of the Attorney General, acknowledged receipt of Mr. Broadbent's letter and forwarded a copy of it to Henry J. Cauthen, Executive Director of ETV. (See Stipulation Exhibit #9.) It is so stipulated that lease negotiations began with MG following the issuance of Mr. Broadbent's letter. (See Proposed Stipulation #16).

During the period from late September, 1985, to December 6, 1985, negotiations proceeded. TT/WCSC and MG concluded this process with the formal submission of priced proposals to ETV for the space desired by ETV to meet its transmission requirements.

On November 25, 1985, MG submitted a proposal to ETV containing payment plans as defined in Stipulation #22. On December 4, 1985, TT/WCSC submitted to ETV a proposal as defined in Stipulation #23. On December 6, 1985, MG submitted an additional proposal designated as Plan Number 1, the ten-year, all inclusive proposal which it had not submitted on November 25, 1985. Each vendor was given the same opportunity for submission of costs in relation to seven (7) different costing categories.

ETV evaluated these proposals using criteria as indicated below:

1. Technical and engineering advantages;
2. Past performance;
3. Value of facilities and location;
4. Cost to the State.

ETV determined that WCSC had the most advantageous proposal to the State in accordance with the evaluation criteria. ETV identified WCSC as offering the lowest cost proposal to the State and the accepted plan allowed a degree of leverage over the entire 50 year lease period.

DGS submitted an agenda item to the BCB recommending that the BCB approve the ETV decision to accept the WCSC lease proposal. After discussion and review of ETV's determination the BCB approved the lease for a period of fifty years under Cost Plan #5.

The CPO did not find evidence in the record of his proceeding which declared MG to be non-responsive in the negotiation procedure used by the GSA and ETV. If MG had been considered non-responsive, the need for negotiation and submission of a final costed proposal was unnecessary. MG was a party in the negotiation process, was given the opportunity to discuss terms, made a formal presentation and submitted a cost proposal associated with their respective lease agreement. Mr. Broadbent, attorney for MG, was aware throughout this period of time from September through December, 1985 that ETV, through its attorneys, was also negotiating with TT/WCSC on substantially the same basis. He knew there was competition for the lease. (Tran I at 169) DGS and attorneys for ETV intended for there to be competition for the lease. (Tran. II at 311) The Panel affirms these findings of fact and conclusions of law as found by the CPO based on the evidence before it.

Because the method used by the Parties was not competitive sealed bidding no party to the negotiation could or should have believed that price alone would be determinative of the award. Exhibit 19 of the Stipulations is the cost comparison of the proposals as developed by ETV and the Property Division of General Services. Having solicited and received multiple payment plans ETV was obviously considering method of payment in its choices to determine the offer most advantageous to the State.

B. The Award

The protestant MG alleges that ETV rejected its bid on inaccurate and incorrect information and further that its bid was prepared and presented without knowledge of the criteria on which it would be judged.

Mr. Robert Sutton, the chief executive officer of the MG broadcast group, who was the company official executing the purchase of the Charleston station in 1983 and who authorized negotiation with ETV on the lease in 1985, testified that neither he nor his employees was never supplied with any technical specifications about tower orientation. (Trans. I at 190, 192, 199-200)

In a face to face meeting with ETV on November 24, 1985, representatives of MG who were preparing their final lease proposal were given no technical information on ETV's

engineering and orientation needs. (Trans. I at 192, II at 231, 234, 334) MG employees further testified that had MG known of these criteria it could have made adjustments to conform its tower at no additional cost to itself in the planning and development stage. (Trans. II at 343, 383, 472)

ETV responds that the proposal selected was technically superior in orientation, provided a signal to preferred areas, required less technical adjustment for ETV and thus less initial cost. The evidence in the record is equivocal on these technical aspects. Experts for each sides produced estimates of time, cost, efficiency and maintenance of an antenna mounted on each of the two towers as well as coverage of the signal. (Trans. III at 476, 556, V at 732, 735, 747)

The critical issue is not the evaluation of these experts' opinions and the choice of one expert's opinion over the other. The issue is whether ETV ever unequivocally explained to Media General, a ready and willing offeror, what technical requirements actually would be used to evaluate the costs and advantage to ETV.

No witness for any party could point to any document as specifically and clearly conveying to Media General the information that ETV needed a tower oriented at 315° N so that its antenna could be attached to a leg of the antenna at that orientation. Documents were exchanged among the commercial stations which noted the 315° mark and the configuration of the joint venture site restricted tower construction to this orientation. (Trans. II at 441, 444, 461) However, none of these documents originated with ETV.

Further, though the engineers for ETV and MG had discussion on technical specifications in November, 1985, (Testimony of A. Hill and C. Bowers) Mr. Bowers for ETV could not point to any document ETV sent to MG after MG purchased the station in 1983 containing ETV's technical specifications for its tower use. (Tran V. at 802)

Mr. Broadbent, attorney for MG testified that he had reviewed all of MG's files and the files of its predecessors in interest "in connection with this Tall Tower proposal". (Trans. I at 48) However, he had no knowledge of any particular technical specifications determined by the parties to the joint venture or to the later leases. Further, in negotiating with members of the Attorney General's Office representing ETV, no technical requirements for tower orientation were given to him nor was any such information sought (Trans. I at 132-33, 149). However, it is the degree of divergence of MG's tower from this 315° orientation which is the source of greater initial cost to ETV should it select the MG Tower for its antenna. (Testimony of Mr. Bowers) MG's engineering consultant, David Steele and Jim Zimmerman, its controller (Trans. II at 236) testified that had MG known of this specification it could have selected the site and designed the tower to accomodate this specification.

CONCLUSION

Because there is no evidence that ETV ever made available to MG information on the technical superiority of the 315°

orientation or that it provided information to offerors which would allow them to consider this as a cost item in formulating an offer, the Panel rules that the tower lease should be re-bid. The Panel denies MG's request that it award the contract to MG because the evidence supports ETV's contention that there will be additional cost to it in selection of the MG tower site rather than the TT/WCSC site as these proposals currently stand. (Tran. VI at 983, V at 732)

The Panel denies MG's request for bid preparation costs and the costs of its protest as should MG obtain the contract on re-bid the award of these costs in addition to the bid would give to MG more than the benefit of the bargain.

IT IS SO ORDERED.

Hugh K. Leatherman, Sr.

May 30, 1986

TALL TOWER, INC. and South Carolina Educational Television Commission, Appellants,

v.

SOUTH CAROLINA PROCUREMENT REVIEW PANEL, Senator Hugh K. Leatherman, Senator Nikki G. Setzler, Representative Luther L. Taylor, Jr., Honorable Grady L. Patterson, Jr., Harriette F. Shaw, J.J. Hesse, Steve Bilton and Jeffery Rosenblum, Each in His Official Capacity as a Member of the South Carolina Procurement Review Panel, and Charleston Television, Inc., Respondents.

No. 22810.

Supreme Court of South Carolina.

Heard Sept. 24, 1987.

Decided Nov. 30, 1987.

Educational Television Commission and antenna tower owner petitioned to review decision of Procurement Review Panel requiring Commission to resubmit tower lease to rebidding. The Court of Common Pleas, Richland County, Walter J. Bristow, Jr., J., upheld decision of Panel. Commission and owner appealed. The Supreme Court, Harwell, J., held that: (1) legislative presence on Panel did not represent unconstitutional encroachment on executive function in violation of separation of powers; (2) hearing provided by Panel did not violate due process; and (3) Commission was not required to notify unsuccessful, perspective lessor of evaluation criteria it would use in leasing space on television antenna tower.

Affirmed in part and reversed in part.

1. Constitutional Law ⇐58

Legislative presence on Procurement Review Panel, which included member of House and member of Senate Labor, Commerce and Industry Committees, did not represent unconstitutional encroachment on executive function in violation of separation of powers, even though legislator presided over review hearing; five executive appointees would always constitute majority; chairman could be executive appointee, legislator, or even constitutional officer; and greater weight was to be given to legislative discretion in designating which legislative committee members possessed requisite special knowledge and expertise. Code 1976, §§ 1-11-10, 11-35-20(f), 11-35-4210(7), 11-35-4410, 11-35-4410(2, 3, 5); Const. Art. 1, § 8.

2. Constitutional Law ⇐276(2)

Failure of Procurement Review Panel to adopt rules for conduct of its business and proceedings to review tower owner's lease of antenna to Educational Television Commission did not substantially prejudice Commission and owner and did not deprive them of due process under State Constitution; Commission and owner were given notice of issues, opportunity to be heard, and right to cross-examine adverse witnesses. Code 1976, §§ 1-23-380, 11-35-10 et seq., 11-35-4210, 11-35-4210(5); Const. Art. 1, § 3; U.S.C.A. Const.Amends. 5, 14.

3. Constitutional Law ⇐252.5

Demonstration of substantial prejudice is required to establish due process claim. Const. Art. 1, § 3; Const.Amends. 5, 14.

4. Telecommunications ⇐414

Educational Television Commission was not required to notify unsuccessful, prospective lessor of evaluation criteria it would use in leasing space on television antenna tower. Code 1976, §§ 11-35-1510 to 11-35-1530, 11-35-1590.

5. Administrative Law and Procedure ⇐764

Telecommunications ⇐426

Procurement Review Panel's statutory violation by requiring Educational Television Commission to notify unsuccessful, prospective lessor of evaluation criteria it would use in leasing space on television tower prejudiced substantial rights of successful lessor and required reversal. Code 1976, §§ 1-23-380(g)(1), 11-35-1510 to 11-35-1530, 11-35-1590.

Charles S. Porter, M. Elizabeth Crum, Celeste T. Jones, of McNair Law Firm, P.A., Columbia, and Robert L. Clement, Jr., of Young, Clement, Rivers, Tisdale, P.A., Charleston, for appellant Tall Tower, Inc.

D. Reese Williams, III, and Daniel T. Brailsford, of Robinson, McFadden, Moore, Pope, Williams, Taylor & Brailsford, P.A., Columbia, for appellant Educational Television Com'n.

Helen T. McFadden and William Hogan Brown, Columbia, for respondent S.C. Procurement Review Panel.

Dwight F. Drake, William C. Hubbard, Barbara H. McArthur, of Nelson, Mullins, Riley & Scarborough, and Jean H. Toal, of Belser, Baker, Barwick, Ravenel, Toal & Bender, Columbia, for respondent Charleston Television, Inc.

HARWELL, Justice:

This action was commenced when respondent Charleston Television protested, pursuant to S.C.Code Ann. § 11-35-4210 (1986), South Carolina Educational Television Commission's (ETV's) award of a television tower lease to Tall Tower, Inc. (Tall Tower). The lease would allow ETV, a state agency, to attach its antenna to Tall Tower's 2000-foot broadcast tower. The Chief Procurement Officer (CPO) of the Division of General Services conducted a hearing, denied the protest, and upheld the ETV tower lease award. Charleston Television timely requested a review of the CPO's decision by the South Carolina Procurement Review Panel (the Panel) pursuant to S.C.Code Ann. § 11-35-4210(5) (1986). After a four day administrative hearing, the Panel reversed the CPO and ordered ETV to rebid the tower lease. Appellants Tall Tower and ETV timely petitioned the circuit court pursuant to S.C. Code Ann. § 1-23-380 (1986) to review the Panel's decision. The circuit court affirmed the Panel's order to rebid, and this appeal followed.

FACTS

This case arose from the long-standing efforts and desires of ETV to have its Charleston television station broadcast antenna located on a 2000-foot television tower, the maximum height allowable under federal regulations, and much higher than any existing tower in the Charleston area.

In January 1984, Tall Tower proposed that it construct the tower and lease antenna space on the tower to ETV and two commercial stations, including Charleston Television. Tall Tower and Charleston Television had extensive negotiations regarding the lease of antenna space on a 2,000-foot tower to be built on property jointly owned by the two parties. Tall Tower also negotiated during that period with ETV for lease of space. In 1985, Tall Tower and Charleston Television decided that each would proceed separately with construction of its own 2,000-foot tower.

The 1985-86 general appropriations bill allocated funds to ETV to lease space on a 2,000-foot tower in Charleston. In June 1985, ETV, in consultation with the Attorney General's office and the Property Management Office of the Budget and Control Board, began specific negotiations with WCSC (Tall Tower's parent corporation) to lease space on its 2,000-foot tower.

In August 1985, after learning that Charleston Television had determined to build its own 2,000-foot tower in the Charleston area, the Assistant Attorney General representing ETV contacted Charleston Television's attorney about leasing space on its tower. Charleston Television made a general proposal, then specific offers to lease space to ETV. The Attorney General's office then solicited new offers from Tall Tower. Both Tall Tower and Charleston Television submitted lease proposals which called for two types of optional payment plans, with the payments spread over various time periods.

ETV ultimately awarded the lease to Tall Tower under its Plan No. 5, a type payment plan which was more expensive than Charleston Television's Plan No. 1 by approximately $85,000.00 in 1986 equivalent dollars. All parties stipulate that the South Carolina Consolidated Procurement Code, S.C.Code Ann. § 11-35-10, *et seq.*

(1986), applies and that this transaction is a real estate lease.

I. CONSTITUTIONALITY

[1] Appellants first contend that the Panel is composed and operating in violation of the separation of powers mandated by Article I, § 8 of the South Carolina Constitution.[1] We disagree.

Article I, § 8 provides that

> In the government of this State, the legislative, executive and judicial powers shall be forever separate and distinct from each other, and no person or persons exercising the functions of one of said departments shall assume or discharge the duties of any other.

Appellants argue that S.C.Code Ann. § 11–35–4410 (1986), which establishes the Panel, impermissibly authorizes legislative branch members to assume and discharge executive branch duties.

The Panel is charged with conducting an administrative review of formal protests of decisions arising from the solicitation and award of contracts pursuant to the Procurement Code. A compositional analysis of the Panel is necessary to address Appellant's separation of powers attack.

The Panel is composed of:

(a) A member of the Budget and Control Board appointed by the chairman;

(b) The chairman, or his designee, of the Procurement Policy Committee;

(c) A member of the House Labor, Commerce and Industry Committee;

(d) A member of the Senate Labor, Commerce and Industry Committee; and

(e) Five (5) members appointed by the Governor from the state at large who represent professions governed by the Procurement Code.

See S.C.Code Ann. § 11–35–4410(2) (1986). Hence, two of the Panel's members will always be from the legislative branch; two may be legislators or constitutional officers; and five Panel members will always be executive appointees. Five members present and voting constitutes a quorum.

Appellants contend that the legislative presence on the Panel creates a *de facto* usurpation of an executive function, namely the carrying into effect of the Procurement Code enacted by the legislature. Even assuming that the Panel is an executive branch administrative agency, we believe the legislative "overlap" is constitutionally valid.

Each contest involving alleged encroachment of powers must be determined on its own facts. *State Ex Rel. McLeod v. McInnis*, 278 S.C. 307, 295 S.E.2d 633 (1982). Case-by-case analysis is necessary because "there is tolerated in complex areas of government of necessity from time to time some overlap of authority and some encroachment to a limited degree." *Id.* at 313, 295 S.E.2d at 636. We are nonetheless unconvinced by Appellant's attempt to distinguish this case from *State Ex Rel. McLeod v. Edwards*, 269 S.C. 75, 236 S.E. 2d 406 (1977). In *Edwards*, we upheld as constitutional the State Budget and Control Board (the Board) against a similar separation of powers attack. Appellants deem critical the distinction between the presiding officers of the Board in *Edwards* and the Panel here: The Board is presided over by the Governor, the chief of the executive branch, *see* S.C.Code Ann. § 1–11–10 (1986); the Panel here was presided over by a legislator. Appellant's emphasis is misplaced.

In *Edwards*, we set forth two major criteria for determining the constitutionality of the membership of a creature of legislative enactment (e.g. the Board) which garnered membership from different branches of government: (1) the legislators should be a numerical minority; and (2) the body should represent a cooperative effort to

1. We previously addressed the Panel's authority in *Ex parte South Carolina Division of General Services*, 283 S.C. 555, 325 S.E.2d 319 (1984), holding the Panel was created merely to make recommendations to the Budget and Control Board and had no authority to resolve protests. The *South Carolina Code* has since been amended to broaden the Panel's scope of authority; the Panel is now statutorily empowered to order a contract reawarded or rebid. *See* S.C.Code Ann. § 11–35–4210(7) (1986).

make available to the executive department the special knowledge and expertise of designated legislators in matters related to their function as legislators. The statutory composition of the Panel comports with both these criteria.

The Panel is a nine-member body. Two legislative positions are statutorily guaranteed, with a possibility of four legislators maximum. The five executive appointees will always constitute a majority. In fact, the record reflects that in the protest giving rise to this appeal, one legislator and four executive appointees constituted the reviewing Panel. Surely the "legislative minority" ingredient was present here.

Appellants also assert as constitutionally offensive the fact that a legislator presided over the review hearing. Appellant cites *State Ex Rel. McLeod v. Yonce*, 274 S.C. 81, 261 S.E.2d 303 (1979) as dispositive against the Panel on the issue of a member of one branch of government presiding over a body performing functions of a different branch. Such a characterization is overly broad, as *Yonce* is readily distinguishable.

In *Yonce*, we held unconstitutional, as violative of separation of powers, a statute allowing the Chief Justice to appoint circuit judges to preside over contested public utility rate cases tried by the Public Service Commission. The statute struck down in *Yonce* mandated the appointment of a member of the judicial department to preside over certain contested cases. The statute here in issue is quite different. The nine member Panel—including executive appointees numbering *at least* five—elects its own chairman. *See* S.C.Code Ann. § 11-35-4410(3). That elected chairman could be an executive appointee, a legislator, or even a constitutional officer such as the state treasurer.

Appellant also argues that the two panel members from the House and Senate Labor, Commerce, and Industry Committees possess no particular special knowledge or expertise to foster cooperation with the executive branch in matters related to their function as legislators. *Edwards, supra.* In *Edwards*, we held:

> The separation of powers doctrine does not in all cases prevent individual members of the legislature from serving on administrative boards or commissions where such service falls in the realm of cooperation on the part of the legislature and there is no attempt to usurp functions of the executive department of the government.

Id. 269 S.C. at 83, 295 S.E.2d at 636, *citing State Ex Rel Schneider v. Bennett*, 219 Kan. 285, 547 P.2d 786, 792 (1976).

We necessarily give great weight to legislative discretion in the designation of which members of which committees possess the requisite "special knowledge and expertise" to increase cooperation between the executive and legislative branches. Such cooperation facilitates an underlying goal of the Procurement Code: "to provide increased economy in state procurement activities and to maximize to the fullest extent practicable the purchasing values of funds of the state." S.C.Code Ann. § 11-35-20(f) (1986). We find no evidence sufficient to denigrate the legislature's conclusion that the House and Senate Labor, Commerce, and Industry Committee members possess the skills to help reach this goal.

The degree of involvement here was much closer to the cooperative spirit in matters related to legislative duties envisioned in *Edwards* than it was to prohibited legislative domination. We discern no usurpation of executive function, and accordingly hold the Panel does not violate Article I, § 8.

II. *Due Process*

[2] S.C.Code Ann. § 11-35-4410(5) (1986) provides that "[t]he panel shall establish its own rules and procedures for the conduct of its business, including the holding of necessary hearings." Appellants contend they were denied the due process guaranteed them by Article I, § 3 of the South Carolina Constitution because the Panel failed to formally adopt such rules and procedures. We disagree.

The fundamental requirement of due process is the opportunity to be heard "at a

meaningful time and in a meaningful manner." *S.C. Nat'l Bank v. Central Carolina Livestock*, 289 S.C. 309, 313, 345 S.E. 2d 485, 488 (1986), *citing Armstrong v. Manzo*, 380 U.S. 545, 552, 85 S.Ct. 1187, 1191, 14 L.Ed.2d 62 (1965). Due process does not mandate any particular form of procedure, but is a flexible concept changing with the circumstances. *S.C. Nat'l Bank v. Central Carolina Livestock, supra.*

We agree with the circuit court order holding Appellants were afforded due process throughout the hearings:

> No issue was raised as to the procedures on the Panel until the second day of the hearing. At that time attorneys for SCETV and Tall Tower, Inc. desired to cross-examine witnesses after the Panel had questioned the witnesses, and the request was denied. Attorneys for SCETV and Tall Tower, Inc. had already completed a full and unhindered cross-examination of each witness. The Panel's decision to prohibit further cross-examination after its own questioning is consistent with due process procedures. The questioning of a witness is always controlled by the adjudicatory body and can be terminated as repetitive and tedious at any time subject to further judicial review for error. Review of the questions submitted in the record reveals that there was no prejudice in this procedure. The subject matter had been fully explored and the repetition after the Panel's questions would have been superfluous.

[3] A demonstration of substantial prejudice is required to establish a due process claim. *Palmetto Alliance v. S.C. Public Service Authority*, 282 S.C. 430, 319 S.E.2d 695 (1984). Appellants were given notice of the issues to be determined, afforded an opportunity to be heard by presenting favorable witnesses, and were given the right to cross-examine adverse witnesses before a tribunal during four days of hearings. Appellants do not show how they were substantially prejudiced by the conduct of the proceedings; indeed, they show little more than mere disagreement with the rulings of the presiding officer.

III. *Evaluation Criteria*

[4] Appellants next contend that the Panel erred in basing its order to rebid on the fact that ETV failed to give Charleston Television notice of its evaluation criteria. The trial court cited Sections 11-35-1520 and 11-35-1530 in upholding the Panel's determination that, since ETV never unequivocally explained to Charleston Television what technical requirements would be considered in awarding the bid, the contract should be rebid. Appellants contend that the trial court erred in considering those Procurement Code sections because this lease was governed solely by S.C.Code Ann. § 11-35-1590 (1986). We agree.

Section 11-35-1510 reads, in pertinent part:

> Unless otherwise provided by law, all State contracts shall be awarded by competitive sealed bidding pursuant to § 11-35-1520, except as provided in ... (10) Section 11-35-1590 (Leasing of Real Property for governmental bodies.)

All parties stipulated that the tower lease is a lease for real estate of non state-owned property. Section 11-35-1590 is the specific provision of the Procurement Code which governs leasing of real property for governmental bodies. That section directs the Budget and Control Board to promulgate regulations to implement the section. The Board promulgated a regulation requiring the Division of General Services to "negotiate all leases of non-state owned real property ..." 23 S.C.Code Ann.Reg. 19-445.2120 (1976).

Neither Section 11-35-1590 nor Reg. 19-445.2120 contains a procedural requirement that ETV, or any other state agency awarding a lease, notify a prospective lessor of the evaluation criteria it will use. Section 11-35-1590 and the Regulation call for a negotiation process for real estate leases and are exempt from the criteria notice requirements necessary under the competitive sealed bidding of Section 11-35-1520. The Panel, therefore, placed a procedural requirement upon ETV that is simply not

provided for in Section 11-35-1590 or the Regulation.

[5] Section 1-23-380(g)(1) of the South Carolina Administrative Procedures Act provides:

> (g) ... The court may reverse or modify the decision if substantial rights of the appellant have been prejudiced because the administrative findings, inferences, conclusions or decisions are:
>
> (1) In violation of constitutional or statutory provisions.

Tall Tower's substantial rights were greatly prejudiced by the Panel's statutory violation. The record is replete with evidence of ETV's substantial compliance with the negotiation process mandated by Section 11-35-1590. The trial court therefore erred in failing to reverse the Panel's Order to rebid.

The Panel's Order is reversed and the Order of the CPO denying the protest of Charleston Television and affirming the lease award to Tall Tower is reinstated.

REVERSED.

NESS, C.J., GREGORY and FINNEY, JJ., and ELTZROTH, Acting Associate J., concur.

STATE OF SOUTH CAROLINA	)	BEFORE THE SOUTH CAROLINA
	)	PROCUREMENT REVIEW PANEL
COUNTY OF RICHLAND	)	CASE NO. 1986-4

IN RE:	)	
	)	
PROTEST BY RUSCON CONSTRUCTION COMPANY AND L. P. COX COMPANY	)	O R D E R
	)	

INTRODUCTION

This matter is before the S.C. Procurement Review Panel (Panel) pursuant to §§11-35-4410 and 11-35-4210, S.C. Code Ann. (1976 as amended). Ruscon Construction Company (Ruscon) and L.P. Cox Company (Cox) timely filed a request for review of the decision of the Chief Engineer. The Chief Engineer's decision rendered on April 22, 1986, found both Ruscon and Cox to be non-responsive bidders for failure to list certain subcontractors and suppliers as required by the documents in the invitation for bids. The Chief Engineer found Wise Construction Company (Wise) to be the lowest responsive bidder. No party raised any question as to the responsibility and ability to perform of any of these three contractors.

On May 21, 1986, the Panel held its hearing on the request for review of Cox and Ruscon. Wise was also present. All were represented by counsel. The parties presented argument but declined to present witnesses. The Chief Engineer was called by the Panel as a witness. He was cross-examined by all parties.

THE PROTEST BY COX

The grounds of Cox's request for review of the Chief Engineer's decision are that the "bid complied with §11-35-3020 which is specifically referred to in the invitation for construction bids. We would further show that the specifications should be interpreted in compliance with the above mentioned statute and that if the specifications are found to exceed the requirements of the Statute, that the same is unlawful." Letter requesting review, 5/29/86 from attorney for Cox.

Cox used the bid documents in the invitation for bids but listed only those subcontractors whose work exceeded 2 1/2% of their bid. The invitation for bids provided a listing sheet for the bidder to fill in the blanks naming certain subcontractors on certain listed items. Cox left many of these blank. They did not list a subcontractor or supplier for each trade listed as the bid documents requested in Paragraphs 9.2.2 - (1) and 9.2.2 (6). (These sections are quoted in full on page 4 - 5, infra.)

Acceptance of Cox's argument would restrict the Chief Engineer's ability to protect the state's interests and insure the highest quality for the lowest price. Section 11-35-3020(2)a says: "The invitation shall include, but not be limited to, all contractual terms and conditions applicable to the procurement." (Emphasis added) Section 11-35-3020(2)(b) says: "The using agency's invitation for bids shall set forth

all requirements of the bid including but not limited to the following..." going on to recite the very language on which Cox relies:

> (i) Any bidder or offeror in response to an invitation for bids shall set forth in his bid or offer the name and the location of the place of business of each subcontractor who will perform work or render service to the prime contractor to or about the construction, and who will specifically fabricate and install a portion of the work in an amount that exceeds the following percentages: Prime contractor's total bid up to three million dollars 2 1/2%
>
> * * *
>
> (ii) Failure to list subcontractors in accordance with this section and any regulation which may be promulgated by the board shall render the prime contractor's bid unresponsive.
>
> (iii) No prime contractor whose bid is accepted shall substitute any person as subcontractor in place of the subcontractor listed in the original bid, except with the consent of the awarding authority, for good cause shown.

(Emphasis added)

This section is intended to protect the subcontractors from bid shopping and to protect the state from the result of bid shopping. (See Logan v. Leatherman , 85-CP-40-3047 Order of Circuit Court at p.11) Nothing in the language of the statute limits the state to these and only these protections. The State, as any other owner going out for bids, may set any conditions in its invitation for bids. The protection for bidders is that the invitation is the same for all bidders. The statute does not set a limitation on the State's requirements in the invitation for bids. It sets a minimum level of protection for the State as owner and for the subcontractors.

The Panel therefore rules that because Cox did not comply with the listing requirements of Paragraphs 9.2.2(1) or 9.2.2(6) their bid is non-responsive.

THE PROTEST OF RUSCON

Ruscon requests review of the Chief Engineer's decision on the grounds that it, not Wise, was the lowest responsive bidder. Ruscon's bid is $2,686,000, and Wise's bid is $2,778,000, thus Ruscon is the lower bidder if it is responsive. The Chief Engineer found that Ruscon improperly listed itself in violation of Paragraph 9.2.2(2) on "miscellaneous and ornamental metal, carpentry and millwork, and steel doors and frames."

> Paragraph 9.2.2(2) states: Any bidder or offerer (sic) in response to an Invitation for Bids shall set forth in his bid or offer the name, the location of the place of business and contractor's license number, where applicable, of each subcontractor or supplier listed by trade on the bid form; work or render service to the prime contractor to or about the construction, and who will specifically fabricate and install a portion of the work in an amount that exceeds the following percentages: Prime contractor's total bid up to three million dollars 2 1/2%
>
> * * *
>
> (ii) Failure to list subcontractors in accordance with this section and any regulation which may be promulgated by the board shall render the prime contractor's bid unresponsive.
>
> (iii) No prime contractor whose bid is accepted shall substitute any person as subcontractor in place of the subcontractor listed in the original bid, except with the consent of the awarding authority, for good cause shown.

(Emphasis in original.)

The issue is whether Ruscon complied with the emphasized language and listed either a subcontractor or a supplier for each trade on the bid form. The language of the bid invitation is in the alternative and the bid form directs one to list: "subcontractors for the following trades as required by 9.2.2(1)." Further, Paragraph 9.2.2 (6) says: "Contractor performing work with his forces in lieu of a subcontractor - the contractor shall list the type of work to be performed with his name in lieu of that of a subcontractor." Ruscon listed a subcontractor or a supplier for each trade as required. On those trades listed in Wise's protest it listed itself as a subcontractor in compliance with 9.2.2 (6). The invitation did not require both the subcontractor and the supplier to be listed nor did the list provided for listing require both the subcontractor and the supplier to be listed. There has been no allegation and no proof that Ruscon cannot perform these trades as listed.

Therefore the Panel holds that Ruscon is the lowest responsive, responsible bidder on State Project No. 8615-H59.

IT IS SO ORDERED.

Harriette Shaw

Harriette Shaw,

Vice-Chairman

May 30, 1986

STATE OF SOUTH CAROLINA	)	BEFORE THE SOUTH CAROLINA
	)	PROCUREMENT REVIEW PANEL
COUNTY OF RICHLAND	)	CASE NO. 1986-5

IN RE:	)	
	)	
PROTEST BY AMERICAN SCIENTIFIC PRODUCTS AND CURTIN MATHESON SCIENTIFIC	)	O R D E R

This request for review is before the Panel for review of a decision of the Chief Procurement Officer (CPO) dated August 13, 1986. Two parties timely sought review of the CPO's decision, American Scientific Products (ASP) and Curtin Matheson Scientific (CMS). A hearing was held on September 10, 1986. All parties were present and represented by counsel.

The contract which is the subject of this dispute is for laboratory supplies, equipment and chemicals for tne period July 1, 1986, through June 30, 1988. ASP asserts two errors in the CPO decision in its request for review:

> 1) that the CPO was incorrect in holding that a "resident vendor must maintain an office in the State in support of its selling function, or, in the alternative, that ASC (ASP) does not maintain such an office."
>
> 2) that the CPO was incorrect in holding that the stock of commodities which must be held by a resident vendor must be physically held within the State.

ASC further asserted in its request for review that the resident vendor preference was unconstitutionally applied to this vendor where its parent company maintains "extensive manufacturing interests in the State but which primarily conducts its sales operation through distribution points in other states."

CMS asserted injury based on General Services' decision to not contract with it over the portion of this contract in dispute. The remedy sought is an order requiring General Services to enter the contract as described in the Statement of Intent to Award on July 7, 1986, making CMS a co-supplier with Fisher Scientific Company on Lot A of this procurement. Alternatively CMS asks for an extension of the contract beyond June 30, 1986, for a period of time equal to the time from July 1, 1986, till their contract is effective.

FINDINGS OF FACT AND CONCLUSIONS OF LAW AS TO REQUEST FOR REVIEW BY ASP

After careful review of the evidence from the hearing of September 10, 1986, the Panel finds no error in the CPO decision and adopts the findings of facts and conclusions of law of the CPO as its own. Counsel and the Panel questioned Mr. Kim Bush, a vice-president of ASP, who testified under oath that neither ASP nor its parent corporation American Hospital Supply maintained an office in South Carolina. One could not reach the vendor by telephoning the number listed in the affidavit for resident vendor status.

A copy of the CPO decision is attached to this order and incorporated therein.

ASP raised a constitutional issue in its request for review. The Panel finds that questions pertaining to the constitutionality of statutes are beyond the scope of its authority. The petitioner must seek review of that issue in a court.

**FINDINGS OF FACT
AND CONCLUSIONS OF LAW AS TO
REQUEST FOR REVIEW BY CMS**

CMS was made a vendor under the notice of intent to award the contract on July 7, 1986. General Services refused to contract with CMS during the pendency of this request for review. This order upholding the decision of the CPO should remove any doubt as to the status of CMS as a vendor under the contract and General Services should act accordingly.

IT IS SO ORDERED

Hugh K. Leatherman, Sr.
Chairman
Procurement Review Panel

DATE: 9-16-86

STATE OF SOUTH CAROLINA)
) 'BEFORE THE CHIEF PROCUREMENT OFFICER
COUNTY OF RICHLAND)

IN THE MATTER OF:
Award Protest of American Scientific)
Product Division of American Hospital) D E C I S I O N
Supply Corporation, New Laboratory)
Supplies, Equipment and Chemicals)
Bid Invitation #1-490-5/01/86P)

This matter is before the Chief Procurement Officer pursuant to the authority granted under Section 11-35-4210, South Carolina Code of Laws, 1976, as amended, and the regulations promulgated thereunder. This section of the State Consolidated Procurement Code grants the right of protest to any bidder who is aggrieved in connection with the solicitation or award of a contract. American Scientific Product Division of American Hospital Supply Corporation (hereinafter "ASC") filed a protest under Section 11-35-4210 of the State Consolidated Procurement Code. An administrative hearing was conducted in the office of the Materials Management Officer on July 25, 1986 with the representatives of ASC, State Procurements (hereinafter "SP"), Curtin Matheson Scientific, Inc. (hereinafter "CMS") and Fisher Scientific Company (hereinafter "FSC"). ASC's protest of the award made by SP is based upon SP's denial of ACS's claim to resident vendor preference in the evaluation and award process of this bid solicitation. The granting of such preference would have given ASC the award for Lot "A", the only lot contested in this award.

FINDINGS OF FACT

I. SP solicited competitive sealed bids for new laboratory supplies, equipment and chemicals for the period of July 1, 1986 through June 30, 1988 in accordance with State Procurement Regulation 19-445.2030. SP forwarded bid invitations to known vendors and advertised its requirements in the South Carolina Business Opportunities publication. SP used bid specifications derived from market research and statewide requirements to best describe the standard of quality, performance and other characteristics necessary to meet its requirements. This methodology has been used successfully on more than one occasion in the past several years.

II. ASC responded to this solicitation and submitted price discounts in accordance with specified lot definitions, catalog numbers and published price lists. ASC also submitted a signed affidavit certifying that it was a South Carolina resident vendor at the time the bid was submitted in accordance with the South Carolina Procurement Code (Act 148 of 1981) as defined in Section 11-35-1520(9)(D) of the 1976 Code of Laws of South Carolina, as amended.

III. ASC, in its certification of resident vendor status, declared that it had meet all conditions necessary to make such a declaration. ASC certified that it was a corporation that is:

1. Authorized to transact business in South Carolina

2. Maintained an office in South Carolina at Kingstree Manufacturing Plant, part of Baxter Travenol Inc. Group, Kingstree, S. C.

3. Maintains a representative inventory which is defined as that inventory for expendable items located in South Carolina at the time of this bid having a total value of $10,000 or more based on the bid price, but not to exceed the amount of the contract, which inventory is representative of the general type of commodities on which the bid is submitted.

4. Has paid all duly assessed taxes.

IV. ASC indicated in its bid document, as required by the solicitation, the following information:

A. Orders should be placed to American Scientific Products, 8350 Arrowridge Boulevard, Charlotte, North Carolina 28210

B. Locations of principal warehouses servicing South Carolina to be:

1. Charlotte, North Carolina

2. Atlanta, Georgia

C. Approximate inventory value at warehouses to be $6,800,000

V. SP denied ASP certification of resident vendor status after it determined, by site visit, that the inventory located in South Carolina, as defined in ASP's Resident Vendor Preference Affidavit, was not representative of the expendable items necessary to support the contract.

VI. SP further determined that the inventory identified by ASC, in its Resident Vendor Preference Affidavit, was medical gloves which represented an insignificant number of line items as compared to the 40,000 to 50,000 line items in which the contract award was intended to support.

VII. SP's denial of resident vendor status to ASC resulted in the award being made on actual bid prices without regard to the two percent (2%) preference granted resident vendors over nonresident vendors. In reality, the award went to Curtin Matheson Scientific Inc. (CMS) based upon the determination that CMS was the lowest responsive and responsible bidder.

VIII. ASC protested the determination made by SP and stated it had satisfied the requirements or conditions for resident vendor status as defined by the S. C. Procurement Code in Section 11-35-1520(9)(D).

IX. ASC contends that the resident vendor status should be evaluated based upon the entire corporate entity in which the following are components.

A. Baxter Travenol Laboratories
   1. Parent Holding Company
   2. Home Office - State of Illinois

B. American Hospital Supply Corporation
   1. Major Division of Baxter/Travenol
   2. Home Office - State of Illinois

C. American Pharmaseal Division
   1. Home Office - Glendale, California
   2. Kingstree Manufacturing Plant reports directly to this division
   3. Division of American Hospital Supply Company

D. American Scientific Products
   1. Division of American Hospital Supply Corporation

2. Sales or marketing division for products referenced in bid
3. Office located in Charlotte, North Carolina

X. ASC stated in the hearing that the Kingstree Plant would ship gloves in lots of 10 cases or more if contract required. No history of this distribution process was made available to the Chief Procurement Officer.

XI. ASC claims the office located in Kingstree, which is in support of the manufacturing process, is considered the office certified in its Resident Vendor Preference Affidavit. This office has no sales or marketing significance but is used in support of the manufacturing effort for American Pharmaseal Division, located in Glendale, California.

XII. "Office" for the purpose of this protest, is defined as a place where business is transacted.

XIII. "Vendor" for the purpose of this protest, is defined as a person or agency that sells.

XIV. The Procurement Review Panel has expressly affirmed and adopted the following as conditions for the designation of a resident vendor qualifying for preferences:

A resident vendor must be a person or organization engaged in the business of selling tangible personal property or services to the State who is in good standing under the laws of the State of South Carolina and who:

1. If selling tangible personal property:

(a) Is a resident of the State or a foreign corporation authorized to transact business in the State; and

(b) Maintains an office in the State; and

(c) Has a stock of materials held in South Carolina for sale in the ordinary course of business, which stock is of the general type offered, and which is reasonably sufficient in quality to meet the ordinary requirements of customers; and

(d) Has paid personal property taxes pursuant to Title 12, Chapter 27, Article 1, et seq., of the Code of Laws of South Carolina, 1976, as amended, on equipment used in the regular course of supplying services of the general type offered; and

(e) Has paid business and occupational taxes pursuant to Title 12, Chapters 19, 21, 23, and 35, as

applicable, of the Code of Laws of South Carolina, 1976, as amended.

A vendor is expressly prohibited from claiming the in-state vendor preference on bids for items not normally stocked or handled by the company, or if the vendor's stock is comprised of samples only and is not sufficient to fill the day-to-day orders of customers.

DETERMINATION

IT IS DETERMINED THAT a resident vendor, as established in Section 11-35-1520(9)(D) of the South Carolina Procurement Code, is a person or organization engaged in the business of selling tangible personal property to the State, who is in good standing under the laws of the State of South Carolina and meets the criteria established by this Code section and definitions adopted by the South Carolina Procurement Review Panel as authorized by Section 11-35-4410 of the South Carolina Procurement Code.

IT IS FURTHER DETERMINED THAT an evaluation of the qualifying conditions under Section 11-35-4520(9)(D) and the definitions adopted by the Procurement Review Panel as applicable to ASC's affidavit, as requested by the protestant, reveal the following:

A. ASC is a foreign corporation authorized to transact business in the State.

B. ASC does not maintain an office in the State in support of its selling function. The Chief Procurement Officer finds that a resident vendor as defined in Section 11-35-1520(9)(D) must maintain an office in support of the selling function, as a vendor is a person or agency that sells. Preference granted for the manufacturing component in the business environment is distinct and Section 16 (4) of the 1985-86 Appropriations Bill addresses such a preference for goods manufactured in disadvantaged counties. Proposed regulations on the purchase of products made, manufactured or grown in South Carolina are not yet enacted. The office of the Kingstree Manufacturing Plant is in support of the manufacturing component of ASC. The sales function of ASC is transacted in Charlotte, North Carolina.

C. ASC does not have a stock of commodities held in South Carolina for sale in the ordinary course of business, which stock is of the general type offered, and which is reasonably sufficient in quantity to meet the ordinary requirements of the contract. The inventory maintained in the Kingstree Plant represents only gloves and is insufficient to satisfy a contract requiring 40,000 to

50,000 line items of other medical supplies, equipment or chemicals.

D. It appears ASC has paid all duly assessed taxes.

IT IS THEREFORE DETERMINED THAT ASC is not a resident vendor as defined in Section 11-35-1520 (9) (D) of the S. C. Procurement Code and its denial as such by SP is affirmed.

Protest Denied.

FOR THE MATERIALS MANAGEMENT OFFICE

Richard J. Campbell
Materials Management Officer

August 13, 1986
Columbia, South Carolina

STATE OF SOUTH CAROLINA	)	BEFORE THE SOUTH CAROLINA PROCUREMENT REVIEW PANEL
	)	
COUNTY OF RICHLAND	)	CASE NO. 1986-6

IN RE:	)	
	)	
PROTEST BY AMDAHL CORPORATION AND INTERNATIONAL BUSINESS MACHINES CORPORATION	)	O R D E R

INTRODUCTION

This matter is before the South Carolina Procurement Review Panel (hereinafter "Review Panel") for administrative review pursuant to South Carolina Code of Laws, Sections 11-35-4210 and 11-35-4410, 1976, as amended. It is a protest of the intent of the State to award to National Advanced Systems (NAS) the bid for the main frame computer, or central processing unit (CPU), at Clemson University. In his determination of this protest, the Chief Procurement Officer (CPO) concluded that Amdahl Corporation's protest was not timely filed pursuant to Section 11-35-4210(1) and accepted no testimony from Amdahl. Several elements of the protest by International Business Machines, Inc. (IBM) were also determined by the CPO to be untimely under §11-35-4210(1) and no evidence was received on those points. NAS, which had not filed any protest, was present at the CPO hearing and represented by counsel. During the hearing, NAS raised issues regarding the responsiveness of the IBM bid. On this oral

motion and the bid documents the CPO ruled IBM was nonresponsive (Record before Review Panel, p. 262-63).

The Panel held its hearing on October 6-7, 15 and 22, 1986. A quorum of the Panel was present. IBM, Amdahl, NAS, Clemson and the Division of General Services were present and represented by counsel. Motions were made by IBM, Clemson and General Services. These were taken under advisement. The Review Panel then requested the parties, for ease of understanding these technical issues, to limit testimony to only the issue of whether the bid of the Amdahl 5880 with a high speed floating point (5880/HSFP) as equivalent to the NAS XL-60 is a responsive bid. The parties agreed to this procedure without objection.

Evidence on this issue was heard on October 6 and 7. An interlocutory order ruling that the NAS XL-60 was not equivalent to the Amdahl 5880 and determining all motions then filed was issued on October 14. The Panel reconvened on October 15 to take testimony on the remaining issues and receive any further motions.

The Order of October 15 is hereby vacated and this order supercedes and incorporates it. This order is the final order of the Panel in this protest based on all the evidence in the hearings.

DETERMINATION OF MOTIONS BEFORE THE PANEL

I. MOTION TO DISMISS IBM

Clemson and General Services moved to dismiss IBM on the grounds that the gravamen of IBM's protest goes to determinations made and published in the invitation for bids (IFB) on July 28, 1986. Items 1, 2, 3 and 6 of the letter of August 18, 1986, are, on their face, protest of the solicitation documents. IBM wrote two letters questioning the IFB on July 21 and July 25, 1986. It certainly had knowledge at that time of its dissatisfaction with the IFB and could have protested then. The argument that these letters were, in fact, protests is specious. If these were protests, then IBM waived its right to be heard by bidding without seeking the CPO's determination on these "protests".

Under the authority of In Re: Request for Proposals for Communication Services for the State of South Carolina (No. 7-725-1107200-07/11/83-41) - Request of American Telephone and Telegraph Co., for Review of the 1983-12 Decision of the Chief Procurement Officer, (hereinafter AT&T), those protests should have been raised when the specifications were published. Clemson and General Services, by publishing the IFB, published their determination that for their purposes the IBM 3090-200, the Amdahl 5090-200 and the NAS XL-60 were "functionally equivalent." (Item 1) The allegation of superiority of the IBM is a restatement of the allegation that the machines are not "functionally equivalent." (Item 2) The allegation that

IBM could not bid another machine is belied by Amdahl's action in bidding this solicitation and the treatment given that action in the Panel's order herein. (Item 3) The evaluation process to determine the functional equivalency of the machines was completed when the IFB was published. (Item 6) Any contest of that process and the determination had to have been made at that time.

Therefore, the Panel rules that Items 1, 2, 3 and 6 of the letter of protest of August 18 are denied as out of time under §11-35-4210(1) and the authority of the AT&T decision.

Clemson and the Division of General Services further moved that IBM be dismissed for lack of standing in that it is not the next low bidder. By their failure to oppose IBM's motion to rescind that portion of the interlocutory order of the Panel which denied IBM's right to participate in the hearing, Clemson and General Services indicated that there was no prejudice to them in allowing IBM to participate in the hearing. Absent some finding of prejudice, the participation of IBM is clearly warranted as IBM was a bidder on this contract. Its evidence and participation can be helpful to the Panel.

II. MOTION TO DISMISS AMDAHL

Clemson and the Division of General Services moved to dismiss the request for review by Amdahl on the same grounds as those discussed in Part I, above, that these were protests of

the IFB and thus untimely. On August 14, 1986, Stephen Dix, Regional Counsel for Amdahl, wrote to Harold Stewart, Information Technology Management Officer, protesting the notice of intent to award to NAS. Only one of these grounds relates to the award decision. The remainder relate to the equivalency of the three machines contained in the invitation for bid (IFB). Insofar as this letter of protest seeks review of determinations made prior to, and evident in, the IFB: 1) the equivalency of the Amdahl 5980, IBM 3090 and NAS XL-60 and 2) the lack of adequate testing to determine equivalency, the protest is untimely under Section 11-35-4210(1) (cited on page 2 above).

The Review Panel concludes that Amdahl had knowledge giving rise to the protest when Vaughn Wahl, Account Executive with Amdahl, wrote Harold Stewart on July 22, 1986, to "offer suggestions for modification of stated IFB which would alleviate Amdahl's concern." This knowledge was further reinforced in Jim Clark's (ITMO) letter of July 28, 1986, responding to Amdahl, when he stated that "[t]his office sees no need for any change to the specifications as presented in the IFB".

A protest of matters contained in the specifications must be raised within ten days of the knowledge giving rise to the protest. Mr. Dix's letter of protest was dated August 14, 1986, over ten days after the IFB was published and more than ten days after Mr. Wahl's letter of July 22, 1986.

Therefore, the motion to dismiss Amdahl's protest as to the following grounds listed in the Dix letter of August 14 is granted: (1) that the three configurations of computers are not functionally equivalent; and (2) that the determination of equivalency was not properly made because it did not include performance testing.

III. PROTESTS OF THE DETERMINATION BY THE CPO

Sections 11-35-4210 and 11-35-4410 provide for a further protest of awards by protest to the Procurement Review Panel. These protests by Amdahl and IBM are contained in letters by counsel dated September 5, 1986, and September 4, 1986, respectively. These protests of the CPO decision rendered on August 29, 1986, are timely. However, these timely protests cannot revive grounds earlier waived by a failure to protest. To allow the protestants to first sit on their rights and then revive them after an intervening proceeding would vitiate the policy of finality embodied in §§11-35-4210 and 11-35-4410. Therefore, the Panel grants the motions to dismiss those protests in these letters of Amdahl and IBM, referenced above, as follows:

(1) Amdahl letter of September 5, 1986 - dismissing items numbered: 3 and 7; dismissing so much of items 6 and 8 as are protests of the specifications in the IFB, as detailed in Section II above.

(2) IBM letter of September 4, 1986 - dismissing items numbered: 1, 2, 3, 6, 12, 13, 14.

IV. IBM MOTIONS FOR REVIEW OF THE AWARD

A. IBM moved for review of this award pursuant to Section 70, Part II, of Act 201 of 1985. This act provides that:

> The State Budget and Control Board by regulation shall develop and implement a policy whereby this State, and its agencies, departments, institutions of higher learning, boards, commissions, and committees in procuring necessary products to perform their assigned duties and functions must obtain products made, manufactured, or grown in South Carolina if available or must obtain products made, manufactured, or grown in the United States if similar South Carolina products are not available before any foreign made, manufactured, or grown products may be procured. (Emphasis added).

The clear and literal language of this act expresses the intent of the General Assembly: that the Budget and Control Board shall develop and implement a policy for granting a preference to South Carolina or American products before purchasing foreign made products. The future tense, "shall" imparts the General Assembly's intent that this is legislation which creates a duty for the Budget & Control Board to act. Until the Board has acted, the General Assembly's will has not been effectuated. This legislation is not self-executing and the Review Panel so concludes. The expression of legislative intent is the principle of first order in statutory interpretation. McMillen Feed Mills, Inc. of S. C. v. Mayer, 265 S.C. 500, 220 S.E.2d 221 (1975).

Section 70 is essentially legislation that is not effective until the happening of a stated contingency, i.e. the promulgation of regulations. The act becomes operative upon the effective date of the regulation.

> "Legislation may be made to take effect upon the happening of a specified contingency, provided the contingency is germane to the subject of the legislation." Sutherland Statutory Construction, Sands 4th Edition, Vol 1A, §20.24, p. 110.
>
> "A statute may take effect upon the happening of a contingency, such as the passage of a law in another jurisdiction, a vote of the people, or the passage of a constitutional amendment." Sutherland Statutory Construction, Sands 4th Edition, Vol 2, §33.07, p. 16-17.

The Review Panel concludes that, as a matter of law and by the express provisions of the act, there is no rule, policy or decision which it can enforce until the regulations have been promulgated under authority of this statute.

As additional grounds for its decision, the Panel finds that to enforce this statutory provision as it is written would grant an absolute preference to certain vendors which violates the Commerce Clause, Article 1, §8, of the United States Constitution. Absent regulations promulgated pursuant to §70 this statute would, thus, be unconstitutional. The General Assembly is presumed to act constitutionally. Bradley v. Hullander, 277 S.C. 327, 289 S.E.2d 140 (1982) It has done so by allowing this statute to be carried out through regulation. Statutes carried out in a constitutional manner are not made unconstitutional because a contrary interpretation, an absolute preference, would be unconstitutional. Casey v. S. C. State

Housing Authority, 264 S.C. 303, 215 S.E.2d 184 (1975). Further, to execute this §70 as an absolute preference will directly repeal §11-35-1520, the resident vendor preference. As provided in the law of South Carolina, such repeal is disfavored unless no other reasonable construction can be applied. Lewis v. Gaddy, 254 S.C. 66, 173 S.E.2d 376 (1970). Because reasonable construction can be applied in the case at hand, absolute preference is disfavored and the statute should not be considered as self-executing. Indeed, where two statutes are in apparent conflict, they should be construed, if reasonably possible, as to allow both to give force and effect to each. Stone and Clamp v. Holmes, et al., 217 S.C. 203, 605 S.E.2d 231 (1950).

B. IBM has made a further motion under §11-35-4410(1) to be heard on a protest of the "procedure used in this case." (Emphasis in original.) Memo of IBM, 10/6/86. It asks the Panel "to order the use of an alternative methodology of procurement or to reevaluate a bid using the appropriate methodology and then order a reward or rebid of the contract." Id. It asserts that the Panel "can...address procurement policies or procedures whether or not those policies are brought to the panel by a formal bid protest." Id.

It is clear in the text of the IBM motion that it is the choices of Clemson & ITMO embodied in this solicitation which they seek to protest here. IBM states it "will prove...that in

order for the procurement to have been most advantageous to this State, the RFP method should have been used, rather than the IFB method." This is either a protest of the solicitation and, therefore, untimely as discussed in part I, or it is a protest as to the system designed and developed by ITMO for high tech purchases. If it is the former, it is untimely, and is, therefore, dismissed. If it is the latter, it is much broader than this hearing and involves more parties than are now before the Panel.

Therefore, the Panel rules that this challenge to ITMO's determination of the relative merits of the RFP and the IFB in high tech procurements is reserved until such time as all parties interested in the method of high tech procurement may be notified. If IBM determines to proceed in this matter to challenge the use of RFP's and IFB's, the Panel will, upon petition of IBM, set a hearing date and invite all interested parties.

Therefore, the Panel rules that this portion of the IBM protest discussed above is severed from the protest of the Clemson computer protest and reserved to a later date. IBM has 50 days from the date of this order to petition the Panel for a date for this hearing as outlined in the memo of October 6. Further, any petition by IBM should state with particularity other vendors or classes of vendors which may have an interest in the hearing and should, thus, receive notice of an opportunity to be heard.

V. DUE PROCESS GROUNDS OF IBM's PROTEST DATED SEPTEMBER 4

Two grounds of protest listed in IBM's letter of September 4, 1986, are allegations of due process violations by the CPO, items 9 and 11.

Item 9 is an allegation of a lack of due process in having the CPO participate in the award of the contract and then judge whether it was properly awarded. This has been determined conclusively against IBM's position by the U.S. Supreme Court and the S.C. Supreme Court in Withrow v. Larkin, 421 U.S. 35 (1975); Hortonville Joint School District v. Hortonville Education Association, 426 U.S. 482 (1976) and Kizer v. Dorchester County Vocational Education Board of Trustees, 287 S.C. 542, 340 S.E. 2d 144 (1986). In these cases, it has been held that a school board acting as a quasi-judicial body under state law to review its own decision to dismiss a teacher does not violate the due process rights of the teacher. As in the process under challenge herein, there are subsequent levels of review to protect any alleged infringement of the teacher's rights or, herein, the protestant's rights.

As to item 9, the Panel rules as a matter of law that no due process rights of IBM have been impaired in following the procedure set out in the Code wherein the CPO first reviews the award of the contract.

Item 11 of IBM's letter of September 4 asserts that the CPO exceeded his authority in concluding that IBM was

nonresponsive in its bid. It appears from the order that the CPO ruled on an oral motion by NAS, examining only the bid documents and refusing testimony. The Panel rules, as a matter of law, that acceptance of oral motions to protest a bid after the time to protest has run is in excess of the CPO's authority. NAS knew, or should have known, the circumstances of the IBM bid when the intent to award was published on August 5, 1986. It cannot on August 25, 1986, protest that this bid is nonresponsive. Therefore, the Panel rules as a matter of law that the CPO's determination in his order of August 29, 1986, that IBM is a nonresponsive bidder is vacated as in excess of the CPO's authority because it violates § 11-35-4210.

DETERMINATION OF THE EVIDENCE BEFORE THE PANEL

I. EQUIVALENCE OF THE XL-60 AND THE 5880

The Panel requested, and all parties consented, that the hearing would be bifurcated. The Panel would first hear and determine the question of whether Amdahl was correct in its assertion that the Amdahl 5880 computer with the high speed floating point (5880/HSFP) is substantially equal to the NAS XL-60 computer configuration listed in the bid. Amdahl presented three witnesses on this point: Vaughn Wahl, the Account Executive who handles the Clemson account; Eddie Wachter, an Amdahl manager in charge of marketing support in the area of which Clemson is a part; and Dick Schardt, a manager for IBM who performs performance analyses on IBM

machines and on the machines of IBM's competitors. At the close of Amdahl's presentation, the Panel took the evidence as on a summary judgment motion to rule whether Amdahl has carried its burden of proof to show that the XL-60 configuration is equaled by the Amdahl 5880/HSFP.

Summary of the Testimony of Wahl

Mr. Wahl is the Amdahl employee who made personal contact with Clemson, the purchaser of this mainframe computer (CPU), and the state through ITMO. As early as April, 1986, he was in contact with personnel at one or both of these agencies to understand the needs of the Clemson environment and to prepare his bid. In his words, "Clemson was looking for a 3090-class machine." He testified at length about Clemson's need to buy computer capacity to sustain at least a 10% growth level for each of the five years of the contract. There was also some discussion of capacity to sustain a 19% per year growth level. At the 19% rate, the computer capacity would have to be doubled in four years and increased by a factor of 2.5 for the fifth year. According to Wahl's testimony at a meeting in June, 1986, Clemson reduced its growth estimate to 10% a year for the five years of the contract.

As a result of the discussions on growth and the relative uncertainty of the growth projections, Mr. Wahl submitted two of his four bid submissions (both for 5880/HSFP) with a guaranteed upgrade option. Such an offer to upgrade was not a

requirement of the bid documents. The offer was to replace the 5880/HSFP with a 5890-300 for 2.4 million dollars. The 5890-300 is a "detuned" 5890-200, meaning it is slower in performance that the -200. The -200 was the requested configuration in the IFB.

In these discussions, prior to the publication of the IFB, all vendors took the opportunity to investigate Clemson's needs and its computing environment. Wahl was apparently successful in persuading Clemson and ITMO that the integrated vector processor was an unnecessary item for Clemson. The item was not a requirement in the final specifications. Had it remained in the IFB, no Amdahl machine could have been bid because none have that function. Wahl also requested that Clemson use a performance benchmark to determine the function and performance of the computer purchased. Of the three configurations listed in the bid, only the IBM 3090-200 had been in multiple production environments at the time the IFB was issued. The Amdahl 5890-200 will not be delivered until the first quarter of 1987. The NAS XL-60 has only recently been placed in a production environment.

No performance benchmark was placed in the IFB. Clemson could not have run benchmarks until its machine was in place except by obtaining access to another owner's computer of the same type. At the time the bid was let, none of the Amdahl or NAS machines were available for benchmarking. Clemson chose to rely on the function and performance ratings published for

these computer configurations in the trade magazines. Mr. Wahl agreed that there is no bias in relying on industry reports to determine machine performance. However, he stated his belief that reports of XL-60 performance are wrong. Clemson chose to rely on the published MIPS ratings for the configurations. MIPS is a measure of speed and capacity. The acronym stands for million instructions per second. It is a measure of how many tasks per second a computer can perform.

Wahl also attempted after the IFB was published to have it amended to include the 5880/HSFP configuration as an alternative. He was unsuccessful in seeking an amendment but determined to his satisfaction after conversations with employees of ITMO, Harold Stewart and Jim Clark, that he could submit a bid for that configuration if he wished, bearing the burden of proof to show his conclusion was correct as to the equivalency of the 5880/HSFP. He based his conclusion on his conversation with Stewart and Clark concerning the MIPS rating of the machines. The 5880/HSFP is in the same MIPS range as the three listed configurations. The 5880/HSFP is a 5880 modified with a high speed floating point for greater speed on scientific programs. Scientific programs and research are rated as one-third of the Clemson computer usage. The HSFP is, thus, an enhancement to the CPU for speed of functioning.

In discussing the function and performance of the XL-60 and the 5880/HSFP, Wahl testified that incremental processing power cannot be added to the 5880/HSFP, but can be added to the

XL-60. The 5880/HSFP is enhanced and expanded to its limits. It cannot be enhanced to handle a 19% growth rate. Its MIPS rating, a measure of capacity, cannot be increased further. The three CPU configurations listed in the IFB are expandable and upgradable beyond the specifications set in the IFB as minimums: 192 megabytes of expanded storage and 48 channels. The 5880/HSFP is, however, expandable to the level set in the bid specifications. Wahl further testified that in the industry press of which he was aware the IBM 3090-200, the Amdahl 5890-200 and the NAS XL-60 are compared as the latest technology of the three competitors. Both the industry and the manufacturers invite comparison among these machines. He further testified that the 5880/HSFP is not in the 3090 class and is not considered so by the industry.

Summary of the Testimony of Eddie Wachter

Mr. Wachter had no direct contact with the State during this procurement. He testified on the technical aspects of the computer configurations. In his opinion, the 5880/HSFP is the "latest technology" (a phrase from the IFB) because it uses the same type of technology, "ECL" as the listed configurations. He concludes that the 5880/HSFP is equal to the NAS XL-60 in function and performance. The 5880/HSFP is not equal to the XL-60 in expandability and upgradability. Expandability is the adding of features and functions. Upgrading is the addition of processing units. Under his interpretation, the IFB did not

require expandability and upgradability. He further testified that the 5880 and 5890 differ in their internal architecture though both are IBM compatible. Because of the differences, however, the 5880/HSFP is at the limit of its expansion and upgrade. The company has no plans to further enhance the 5880/HSFP. Because the 5880/HSFP can not be upgraded or enhanced except by replacement, he testified that the three configurations in the bid would be cheaper to an owner who projects growth in his needs. The XL-60 can be upgraded by adding hardware. Its switching time and gates per chip are appreciably higher than that of the 5880/HSFP and its main memory is 4 times larger.

Mr. Wachter testified that he had not done any performance measures comparing the NAS XL-60 to any of the Amdahl machines. He stated that he based his conclusion that the XL-60 is not equal to the Amdahl 5800/HSFP on reading the trade press and the documentation of vendors.

Under cross-examination, Wachter testified that the following features are the current or "latest technology" in computers: (1) the chip fabrication technique, ECL being most current; (2) the heat output, less heat output being more current; (3) power usage, less power usage being more current; (4) smaller size of CPU, by cubic measure the smaller is more current; (5) fewer component parts, the more current machines having more functions built in; (6) higher chip density; (7) greater main memory; (8) greater number of data paths; (9)

weight, lighter being more current; (10) improvements in high speed buffer; (11) the quicker switching speeds; and (12) the number of gates per chip, higher being more current. In all these measures, he testified that the 5890 was more current than the 5880/HSFP.

Summary of the Testimony of Dick Schardt

Mr. Schardt is the manager of IBM's performance analysis center in Maryland. In September, 1986, he ran a series of performance tests on a machine, the M680 manufactured by Hitachi, modified as the XL-60. In his opinion, the machine he has in his possession is an XL-60. He compared its performance and functions to the IBM 3090-200. His tests showed the NAS XL-60 is equivalent in function to the IBM 3090 but 20% to 50% less in performance, a measure of speed, than the IBM 3090. He has made no measurement in MIPS of either computer. He has not tested a 5880/HSFP or an Amdahl 5890-200. The latter is still not available in production. In his opinion, the XL-60 will reach its maximum capacity in three years at Clemson with a 10% growth rate. He has not, however, visited Clemson, and did not testify to the baseline he set from which to measure the 10% increments.

FINDINGS OF FACT

1) The specifications solicited a 3090 class machine which was the "latest technology" of the company bidding.

Latest technology is determined by the following factors: Chip fabrication process, heat output of the processor, power usage, cubic size of the CPU, weight of the CPU, number of component parts, chip density, switching time, the gates per chip measure and the internal architecture of the machine.

2) Clemson needed an increase in computer capacity. It was attempting to plan for its growth over the life of the contract (5 years). It projects a 10% to 19% growth rate in computer usage. All bidders were aware of the growth projections of Clemson.

3) The configurations listed in the IFB were all the latest technology of their manufacturer. The configurations were equivalent in function. Function is a determination of the tasks the computer can do. All of the listed configurations can perform the functions required by Clemson. Each was expandable and each was upgradable.

4) Clemson chose to rely on publications of vendors and industry trade press to determine which CPU's could perform in the Clemson environment in light of their projected growth. Clemson further relied on this information to determine equivalency among vendor's machines. At the time the IFB was let, the Amdahl 5890 and NAS XL-60 were not available to Clemson for performance benchmarks.

5) The specifications listed in the IFB were minimums to be met for function and capacity. Thus, no machine for which these levels of function and capacity were maximums could meet the specifications.

6) Performance, a measure of speed, is not equal among the configurations in the IFB. No measure of speed is required in the IFB.

7) Industry sources compare the IBM 3090-200, the Amdahl 5890-200 and the NAS XL-60 as the latest technology of each manufacturer. These sources do not place the Amdahl 5880/HSFP in this category.

8) The Amdahl 5880/HSFP uses the latest in chip fabrication technology but its internal architecture is such that it has been expanded and upgraded to its limits. The internal architecture of the 5880/HSFP differs from the 5890-200. The manufacturer has no plans to further modify the 5880/HSFP. In all measures listed above in part 1, the 5880/HSFP is exceeded by the Amdahl 5890-200.

9) The NAS XL-60 uses the latest technology of its manufacturer and is expandable and upgradable in place without replacement. Expandability means features and functions can be added to the CPU. Upgrading means that additional processing capacity can be added to the CPU. The XL-60 exceeds the requirements of the specifications.

10) The Amdahl 5880/HSFP is expandable and upgradable only by means of replacement of the CPU. It can perform the functions required by Clemson. It cannot perform these functions at a 19% growth rate for the term of the contract. The 5880/HSFP cannot accept incremental processing power. The XL-60 can accept incremental processing power. The 5880/HSFP is at its maximum to meet the specifications.

CONCLUSIONS OF LAW

1) This bid was a brand name or equivalent bid. Therefore, Amdahl or any vendor could, at its discretion, bid any product it believed to be equivalent to one of the named configurations in the specifications. The specifications were minimum requirements.

2) Amdahl has not carried its burden of proof to convince the trier of fact that the 5880/HSFP is equivalent to the XL-60 in the Clemson environment where the level of growth is between 10 and 19% and the need for latest technology is required to provide for expandability and upgradability. The 5880/HSFP is at its maximum to meet the specifications while the XL-60 exceeds the specifications.

Therefore, the Panel rules against the protestant Amdahl that its bid on the 5880/HSFP is the lowest responsive bid and upholds the termination of ITMO that the bid of the 5880/HSFP is nonresponsive.

II. REVIEW OF THE NAS BID

The issues remaining after the determinations above focus on the responsiveness of the NAS bid and NAS's compliance with statutory provisions on the prohibition of gratuities. (Amdahl letter of 9/5/86, items 5, 6, 8; IBM letter of 9/4/86, items 4, 7; and IBM letter of 8/29/86) These may be summarized in detail based on argument of counsel as follows:

(1) The NAS bid is alleged to be nonresponsive because

(a) it fails to comply with the requirement for 90%

of spare parts in the Greenville area;

(b) it fails to comply with the 48-hour installation requirement because the chiller has been installed;

(c) it fails to comply with the requirement to have 100% of the parts available within 24 hours;

(d) it fails to comply with the 7-year parts availability requirement;

(e) the NAS references were insufficient to allow ITMO to evaluate the XL-60 performance.

(2) It is alleged to violate the prohibition against gratuities because

(a) the chiller has been installed prior to signing a contract;

(b) addenda 1 to the bid is an inducement or offer for products without charge.

The testimony in this bifurcated proceeding was by consent of all parties considered cumulatively. The testimony of Amdahl's witnesses on October 6 and 7, 1986, was relied on in reaching these determinations. Further testimony was elicited on the remaining issues.

Summary of Testimony of Cary Smith

Cary Smith is the IBM branch manager in Columbia, South Carolina, and the senior state executive for IBM. He has

worked for IBM since 1966 and was for three years in charge of the Clemson account. He has some experience in performance measurement of computers. In his opinion, the NAS bid is unresponsive because: the NAS equipment has not been in a production environment for long enough to evaluate its performance and reliability; its references were insufficient to determine performance and reliability; the statement that a spares kit would be available does not in his opinion equal 90% of parts; and the addenda was an unsolicited offer from NAS.

The references were requested to be in the United States. NAS listed only three, one of which was in Australia, one of which had not been shipped at the time the IFB was let, and one of which had been in production only two weeks at the time of bid opening. The ITMO Manual for High Tech Acquisition, in his opinion, requires that a system be installed and working 90% of the time for 30 days before it is "accepted." Further, of NAS references only Grumman was using the MVS/XA, an IBM software system which Clemson uses and which is specified in the bid for use. However, he agreed that no number of references, period of installation or type of facility for references was specified in the IFB.

As to the equivalence of the spares kit to 90% of the parts, Mr. Smith testified he had never examined a NAS spares kit. He believed it wasn't 90%, because the NAS bid didn't say it was.

The addenda of NAS, he testified, implied an agreement between NAS and Clemson on workload. However, the current

Clemson computer is an IBM 3081K, and IBM has complete access to current and historical data on Clemson's workload. He further testified, corroborating Mr. Wahl, that all parties visited Clemson for discussions on workload and projected workload.

He also testified that the NAS bid was ambiguous, in his opinion, concerning the installation of the CPU and the chiller within 48 hours. The NAS bid references only the CPU as within the 48 hours.

Summary of Testimony of Tony DePuma

Mr. DePuma is the district manager for Amdahl in the southeast. He did not testify to any direct involvement in the Clemson bid. He testified that, in his opinion, the NAS responses on parts and installation were modifications of the bid specifications and were not in compliance. However, he has not examined a NAS spares kit. He testified that Amdahl intended to install the same chiller as NAS and would have done it in the same 48-hour period in which it installed the CPU.

Amdahl did not bid an upgrade on its 5890 series, he stated, because it was not requested. However, the list price for the upgrade of the 5890-200 is $675,000. In contrast, the list for the NAS upgrade of the XL-60 is $2.9 million.

Summary of Recall of Eddie Wachter

Mr. Wachter was recalled to testify as to various workload projections and the capacity of the IFB configuration of NAS and Amdahl. Using the 15 MIPS capacity of the 3081K which Clemson now has as its baseline, he projected the capacity of the machines at 10%, 14.5% and 19% annual growth rates. For the MIPS capacity of the machines he relied on trade publications. By his calculations, none of the configurations would carry a 19% or 14.5% growth for the five years of the contract, and at 10% growth, all would. He stated that at 10% after five years the XL-60 would be at capacity and the 5890-200 would have remaining capacity.

Summary of Testimony of James Hopkins

Mr. Hopkins has, since 1978, been the administrator for data processing at Clemson. With regard to this bid, Hopkins was the person designated for consultation on the environmentals of the computer purchase. He was contacted on August 6 by Tom Collins, a representative of NAS, who inquired whether there would be any objection to the installation of the chiller and what the most convenient date would be for installation of the CPU. This was the day after ITMO issued a notice of intent to award. He stated that installation of the CPU for the last week in August would be the most convenient date for Clemson based on their computer usage. NAS had offered September 28 in its bid. Clemson took the position that, within the stated parameters, the installation date was

negotiable. However, the installation date and the chiller installation had to be authorized by ITMO.

ITMO authorized the chiller installation with the understanding that all risk to the chiller remained on NAS. Hopkins believes that the contractor has not yet been paid by NAS. The chiller has, however, been installed except for the electrical input, which is to be secured from lines leading to the current computer. From Hopkins' viewpoint, the prior installation of the chiller is "insurance" that the CPU installation can be completed in 48 hours or less. The less down time of the system, the better for Clemson.

Hopkins testified he had never inventoried a NAS spares kit. However, he was satisfied that the NAS bid was responsive. He has been assured by NAS that the kit has 90% of the parts.

As to the addendum, Hopkins is not aware of any agreement between Clemson and NAS. He believes that this refers to a future agreement.

Summary of Testimony of Jim Clark

Jim Clark has been a technical analyst with ITMO for approximately three years. He was in computer maintenance before with Wang, NAS and IBM. On this procurement he, under the supervision of Harold Stewart, was the chief analyst. He prepared the IFB, received, opened, compared and recalculated the bids. He checked the bids and contacted the reference accounts. He was able to reach only Grumman of the NAS .

references. At the time of his call, Grumman had been in production with the NAS computer for one month and had run MVS/XA for two weeks. Performance was satisfactory according to Grumman.

In reviewing the bids, he was satisfied that NAS was responsive on parts and installation. He interprets NAS's comments on parts as a reiteration of the guarantee. The early installation of the chiller was "insurance" of greater likelihood that Clemson would be "down" only 48 hours or less. To install the chiller to the extent it is now does not require taking Clemson down. Reducing "down" time is beneficial to Clemson, in his opinion. Further, there is only 4 to 6 hours for installation after removal of the machine now in place. The chiller installation gives a margin of error for the CPU installation. He first knew of the possibility of early installation of the chiller by a call from Hopkins. He referred the question of early chiller delivery to Stewart who approved it if done at no risk to Clemson. He did not understand that it was not to be installed, only delivered.

Clark evaluated the bids for award along with three persons from Clemson. He did not include addendum 1 in his evaluation of bids. His contacts in evaluating the performance of the XL-60 were NAS employees and the inquiry at Grumman. However, he has never seen an XL-60 and does not personally know the contents of their spares kit.

In Clark's opinion, the NAS bid is the lowest responsive and responsible bid. If NAS later fails to comply with the bid

specifications, then Clemson can take action to enforce the contract. From his perspective, unless a bidder makes a specific exception to a bid requirement, the signature on the bid binds the bidder to the conditions set forth in the bid.

In response to questions concerning the ITMO high tech acquisition manual, Clark explained it is a teaching tool, not a manual for procurement. He used nothing from the manual in preparing the bid. ITMO has a procurement manual of standard contract paragraphs which is continually updated in consultation with the Attorney General. This was the source of the IFB language.

Summary of Testimony of Michael Guirilli

Mr. Guirilli is the district manager for NAS. He has been employed by NAS for eleven years and was previously employed by IBM. He prepared the NAS bid for this IFB. He wrote the NAS response to parts availability. He did not intend to modify the parts requirement of the IFB and does not believe his response does so.

The NAS response to the installation requirement and the installation of the chiller were not intended to modify the 48-hour requirement for installation. The delivery and partial installation of the chiller were done to increase the likelihood that the Clemson CPU would be down less than 48 hours. The chiller has been delivered and partially installed at NAS's risk. The environmental equipment was bid in the

dollar figure quoted on the bid sheets. It is necessary to the function of the CPU. He understands his 48-hour installation commitment to be a limit on the down time of the Clemson computer.

Addendum 1 is the NAS response to the written inquiries of the other vendors. Pursuant to rules and statutes, the communication between vendors and the state subsequent to publication of the IFB must be written and must be distributed to all vendors. He did not understand this offer to be an attempt to modify the bid requirements. He understood it as an offer in reply to questions of other vendors concerning the needs of Clemson. He testified there is no extra agreement between NAS and Clemson. This is an offer to work out in advance a contingency plan to cover Clemson if the growth estimates are too conservative.

The NAS spares kit is a standard item, he testified. It contains almost a whole new computer. It is a composite of spares for a particular machine. In his opinion, the NAS XL-60 will fulfill Clemson's computer needs for the term of the contract. NAS' bid is low because it wants the contract, and it will comply with all requirements at the price offered.

Summary of Testimony of Harold Stewart

Mr. Stewart is the CPO for ITMO. Collins of NAS contacted him for permission to deliver the chiller on August 7 or 8. He gave three people his permission to deliver the chiller, if done at no risk to Clemson: Jim Clark, Jim Hopkins

and Tom Collins. Collins called him after Hopkins informed Collins it would require ITMO's consent to deliver the chiller at that time.

FINDINGS OF FACT

(1) Clemson evaluated the three listed computer configurations based on industry publications. At the time the IFB was being prepared, only the IBM configuration was in a production environment. If ITMO and Clemson had required of bidders what IBM now argues for as appropriate evaluation tools, only IBM would have been able to bid. The proposed IBM requirements -- 30 days in production environment, benchmarks, three or more references, would freeze out all but IBM.

(2) Clemson solicited bids on the latest technology in terms of function. Its specifications were minimums to be offered. The configurations vary in speed or performance but all can perform Clemson's required functions.

(3) Based on NAS's testimony under oath, all of its responses on the bid documents are deemed to be explanations of, and not limitations on, its performance under the contract. It has stated an inclusive price for all parts, maintenance, warranties and equipment requested by the IFB. It has bound itself to perform the removal of Clemson's current computer and the installation of the NAS computer within a 48-hour period of "down time" for Clemson. It has bound itself to maintain an inventory of 90% of the parts in the Greenville

area and to provide 100% replacement within 24 hours. It has bound itself to provide 24-hour maintenance and to maintain parts availability for seven years. It has bound itself to provide maintenance, without additional charge to those stated in the IFB for labor, parts, or other costs for a period of five years after installation. It has bound itself to perform these requirements at the price stated in the bid and without increase.

(4) The cost of the installation of the chiller is included in the bid price. Addendum 1 is an offer to negotiate for further equipment at a future date. It was not considered in ITMO's evaluation of the bids.

(5) The NAS XL-60 will provide capacity for Clemson's computer needs for five years at a 10% annual growth rate. None of the configurations could carry a 19% annual growth rate without additional processor capacity.

(6) Clemson and ITMO were contacted by NAS subsequent to the notice of intent to award was published and prior to the signing of a contract for the installation of the CPU. The IFB prohibits contact between vendor and vendee prior to finality of award. NAS sought permission to deliver the chiller which was given by ITMO. ITMO required assurance that the delivery was at no risk to Clemson. NAS sought information on what was the preferred installation date for Clemson. The date given was the last weekend in August. NAS had offered September 28 in its bid.

(7) Installation of the chiller prior to the CPU gives Clemson a higher likelihood that the installation will be

completed in 48 hours. It reduces the likelihood that NAS will fail to comply with this requirement.

(8) Purchase of high tech equipment without performance testing involves risk to the buyer. However, where the purchase involves the newest products, such testing was an impossibility for certain of the vendors, and testing would have reduced competition and thereby increased the price to the State.

CONCLUSIONS OF LAW

(1) The NAS bid is the lowest responsive and responsible bid.

(2) NAS will be contractually bound to provide maintenance without additional charge to those stated in the IFB for labor, parts or other costs for a period of five years from the date of installation of the CPU.

(3) When ITMO issues a Notice of Intent to Award there has been a meeting of the minds and the terms of the contract have been determined. Only signature on a document remains to make the contract enforceable against the state. Offer and acceptance have been completed and only payment and performance remain. No material terms of the contract can be varied after the notice of intent to award. Thus, the purpose served by the prohibition on communication has been fulfilled and there is no continuing need to prohibit communication further between vendor and vendee.

(4) NAS has not offered any gratuities inducing the award of this bid.

Therefore, ITMO's notice of intent to award to NAS is final and a contract should be awarded to NAS.

IT IS SO ORDERED.

Hugh K. Leatherman

November 6th, 1986

STATE OF SOUTH CAROLINA	)	BEFORE THE SOUTH CAROLINA PROCUREMENT REVIEW PANEL
	)	
COUNTY OF RICHLAND	)	CASE NO. 1986-7

IN RE:	)	
	)	
PROTEST BY MACCO, INC.	)	O R D E R
	)	

This matter is before the Procurement Review Panel (Panel) for administrative review pursuant to §11-35-4210(5) and §11-35-4410(5), South Carolina Code of Laws (1976, as amended) after a decision issued by the Acting Chief Procurement Officer for Construction and a request for review of that decision by MACCO Contracting, Inc. (MACCO). A hearing was held on October 14, 1986. A quorum of the Panel was present. The using agency, S. C. Vocational Rehabilitation Department, MACCO and General Services were present and represented by counsel. J. A. Metze and Sons, Inc. (Metze) was present but was not represented by counsel. Tyler Construction Company, Inc., timely filed a protest with Acting Chief Procurement Officer and was present at his hearing on August 22, 1986. Not having timely filed for a review by the Panel, Tyler sought to renew its protest by a letter dated October 8, 1986, and by motion at the hearing before the Panel. Since the time provided in §11-35-4210(5) for seeking review before the Panel had long since passed, Tyler's request was orally denied.

FINDINGS OF FACT

The uncontroverted testimony reveals the following facts on which the Panel bases its conclusions and order.

1. The bid submitted by Metze contained a noncollusion affidavit that was signed by James B. Metze, but the affidavit was not notarized.

2. The I.F.B., page 3, under "LISTING OF SUBCONTRACTORS", required the following:

> "List subcontractor(s) as indicated by trade. Also, list by trade any other subcontractor whose costs exceed the percentages in Paragraph 9.2.2(1) of the Instructions to Bidders.
>
> If the prime contractor is to perform work with his forces for a listed trade, he shall list his name in lieu of a subcontractor."

3. The bid by Metze also failed to list who would perform the work for the following trades: concrete work; roofing (shingles) installation; rough carpentry; masonry work; drywall, furring and metal stud work; carpet installation.

4. James O. Metze, Vice President of Metze, testified that all subcontractors providing work totalling

more than two and one-half percent of the total amount bid were designated in Metze's bid. The I.F.B. stated the prime contractor must list his name in lieu of a subcontractor if the prime contractor is to perform work with his employees for a listed trade. Mr. Metze testified that he read this requirement but that he concentrated on the subcontractors providing more than 2 1/2% and simply failed to list Metze as providing the work for the trades listed in #2 above. He further testified that he understood that this information was required by the I.F.B.

5. Metze was determined to be the lowest responsive and responsible bidder after General Services, in consultation with the owner, decided to waive the requirements relative to the listing of subcontractors.

DISCUSSION AND CONCLUSIONS OF LAW

MACCO asserts that, due to the omissions found to be fact by the Panel in Items 1 and 3 above, the bid of Metze should be declared nonresponsive. Section 11-35-1410(7) of the S. C. Code of Laws (1976, as amended) defines a responsive bidder as "a person who has submitted a bid which conforms in all

material aspects to the Invitation for Bids." [Emphasis added]. Consequently, minor flaws or omissions are not grounds for a bid to be rejected. Only a "bid which fails to conform to the essential requirements of the Invitation for Bids shall be rejected." (Reg. 19-445.2070(A))

1. The Panel concludes that the omission of six subcontractors or the failure by Metze to list itself as performing the work in six of the sixteen trades listed on the bid fails to conform to the essential requirements of the invitation for bids, as required by Reg. 19-445.2070(A). The requirement to list subcontractors is designed to prevent bid shopping, and the failure to list who is to perform the work in these trades is prejudicial to the other bidders. It is prejudicial because under §11-35-3020(b) the listing of the subcontractors acts as an enforceable contract between subcontractors and general contractors. The failure to list subcontractors thus frees the general contractor to contract after receiving the award with any subcontractors. Therefore, the omission of this information in Metze's bid is material and warrants a determination that its bid is nonresponsive. The Panel so rules.

2. Having determined that Metze's bid is nonresponsive for the reasons cited above, it is unnecessary for the Panel to

decide whether the failure to notarize the affidavit of noncollusion is sufficient grounds for a bidder to be deemed nonresponsive.

3. The Portion of the CPO's determination declaring MACCO's bid responsive is upheld by the Panel. The remaining portions of the CPO's determination are hereby overruled.

Consequently, since Metze's bid is nonresponsive, MACCO is the lowest responsive and responsible bidder for project No.8824-H73.

IT IS SO ORDERED.

Hugh K. Leatherman
Chairman, Procurement
Review Panel

Columbia, South Carolina
November 6th, 1986

STATE OF SOUTH CAROLINA	)	BEFORE THE SOUTH CAROLINA
	)	PROCUREMENT REVIEW PANEL
COUNTY OF RICHLAND	)	CASE NO. 1986-8

IN RE:	)	
	)	
PROTEST BY HANDYMAN EXCHANGE, INC.	)	O R D E R
	)	

This matter is before the South Carolina Procurement Review Panel (Panel) pursuant to a request by Handyman Exchange, Inc. (Handyman) for Review of the Decision of the Chief Procurement Officer (CPO). A hearing was held on October 14, 1986. A quorum of the Panel was present. General Services was present and represented by counsel. Handyman was present but was not represented by counsel. Handyman was represented by its President, Mr. Andre V. Woods.

FINDINGS OF FACT

1. The Materials Management Office issued an Invitation for Bids (I.F.B.) on July 15, 1986. The I.F.B. sought bids from temporary employment service agencies in various areas of the state for sixteen job classifications. State agencies could then utilize temporary help in these classifications as needed.

2. Handyman bid on the providing of temporary services for state agencies in the Charleston area.

3. Special Provision #11 of the I.F.B. provides that:

"The three (3) lowest bidders will be selected based on the lowest aggregate hourly cost for each location. From this the primary, first alternate and second alternate contractors will be selected for each classification."

4. Under "Conditions," the I.F.B. included the following:

"5. Prices bid must be based upon payment in thirty days after delivery and acceptance. Discount for payment in less than thirty days will not be considered in making award." [Emphasis added]

5. The first page of the I.F.B. contains the following:

"DISCOUNT: Discount will be allowed as follows: 30 calendar days _____ per cent."

6. The I.F.B., under "Special Provisions", instructs bidders to:

"12. ... Enter on the Bidding Schedule your short term hourly rates and show any discounts for long term and the minimum length to qualify; for long term. The State reserves the right to use or not to use the long term rates in the evaluation of bids...."

7. After identifying the three lowest responsive and responsible bidders based on total hourly aggregate bid in each geographic area, the lowest hourly rate for each job classification, including any discount for payment in thirty days, was used to determine the primary vendor and the first and second alternate vendors. State agencies would call the primary vendor first to seek temporary employees. If this vendor was not able to provide the temporary help when needed, the state agency would then look to the first alternate and the second alternate, if necessary, to obtain the required

services. Long term discounts were not considered in the evaluation of the bids.

DISCUSSION AND CONCLUSIONS OF LAW

Handyman asserts that the bid document is inconsistent and that discounts were improperly used to choose the lowest responsive and responsible bidder. Handyman argues in its letter of protest that the I.F.B. is not inconsistent and, therefore, the "Order of Precedence" found under "Services General Provisions" as #2 should not be employed.

The bidding schedule provides for the listing of long term discounts but in no way indicates that this discount will be considered in making the award. The state clearly reserved the right to use or not use this discount in evaluating the bids. (Findings of Fact, 6). The Panel concludes the long term discounts were properly disregarded due to the inability to quantify the impact that these discounts may have on the total cost to the State for the job classifications enumerated in the I.F.B. The Panel further concludes that the I.F.B. is consistent and, therefore, it is unnecessary to consider the provision relating to the "Order of Precedence".

Handyman further asserts that basing prices bids on "delivery and acceptance" is ambiguous and inconsistent when applied to the temporary help industry.

2. "Special Provisions" #10 provides that "Invoicing shall be accomplished in accordance with the requirements of the individual agencies." Mr. Andre Woods, President of Handyman,

testified that he had bid this contract in the past and that he was accustomed to billing particular agencies as their policies dictated. Consequently, the Panel concludes that Handyman was not prejudiced in arriving at competitive prices for the services solicited because the term "delivery and acceptance" was used in the I.F.B.

The remaining matters in Handyman's protest relate to the consideration of discounts for payment in thirty days. The provisions of the I.F.B. that relate to discounts are incorporated in this order under Findings of Fact.

3. The language under Findings of Fact #4 and #5 is contained in virtually all I.F.B.'s issued by the state under the Consolidated Procurement Code. Charleston Temporary Services, Inc., the primary vendor for several of the job classifications in the Charleston area, also offered a discount of one percent (1%) in last year's solicitation for this contract. Discounts for payments made in thirty days are proper while basing a discount for payment in less than thirty days will not be considered. Although the language relating to the payment of discount could have been more artfully drafted, the Panel concludes that I.F.B. was not inconsistent or unfair. Any other interpretation of the language under Findings of Facts #4 and #5 would be illogical.

4. The Panel expressly rejects the conclusion of the Materials Management Officer in his determination of September 8, 1986, that Handyman's protest was groundless and "[does] not

address matters germane to the solicitation or award provisions of the South Carolina Procurement Code." The Panel, however, for the reasons cited above, concludes that Handyman failed to meet its burden of proof in asserting that the I.F.B. was unfair or that the contract was awarded based on criteria not set forth in the I.F.B.

The Panel, therefore, rules that Charleston Temporary Services was properly selected as the prime vendor in the Charleston area for those job classifications indicated in the Statement of Award for bid #1-794-08/06/86-p.

IT IS SO ORDERED.

Hugh Leatherman
Chairman, Procurement
Review Panel

November 13th, 1986
Columbia, South Carolina

STATE OF SOUTH CAROLINA	)	BEFORE THE SOUTH CAROLINA PROCUREMENT REVIEW PANEL
	)	
COUNTY OF RICHLAND	)	CASE NO. 1986-9

IN RE:	)	
	)	
PROTEST BY DAVIS AND GECK, INC.	)	O R D E R
	)	

INTRODUCTION

This matter is before the South Carolina Procurement Review Panel (Panel) for administrative review pursuant to South Carolina Code of Laws, Sections 11-35-4210 and 11-35-4410, 1976, as amended. It is a protest of the award of a suture contract at the Medical University of South Carolina (MUSC). Ethicon, Inc. (EI) was awarded the contract and Davis and Geck, Inc. (DG) filed a protest with the Chief Procurement Officer (CPO). After a hearing, the CPO determined that EI was properly awarded the contract. DG requested a review before the Panel.

A hearing was held by the Panel on October 28, 1986. Davis and Geck was present but was not represented by counsel. Mr. Randy Hawley, Southern Area Director of Davis and Geck, presented their protest. Ethicon was present and represented by counsel, Mr. Fred Gertz. MUSC was present and represented by Judy Finuf, General Counsel MUSC. The Division of General Services was present but their counsel, David Eckstrom, did not participate.

STATEMENT OF FACTS

The invitation for bids (IFB) in this protest was a request for bids for sutures for a three-year period for the Medical University of South Carolina (MUSC). The IFB was 133 pages, listing various kinds of sutures. The list was developed in consultation with the operating room staff and the suppliers of sutures. The list finally appearing in the IFB is the list of sutures for which there are at least two manufacturers. However, each manufacturer of sutures does not make every suture listed. There are two major suture manufacturers: Ethicon, a division of Johnson and Johnson, and Davis and Geck, a division of American Cyanamid. The other manufacturers of sutures do not make a wide range of suture material but specialize in a particular type of suture material. Alcon, for example, makes sutures used in opthalmic surgery.

MUSC began this process of preparing an IFB for sutures by going to its operating room supply shelves and simply cataloging what was used. Then, from this list, in consultation with its suppliers and the manufacturers, it culled from the list those types of suture for which there was only one manufacturer. Those were to be sole sourced of necessity. The remainder were to go out for bid and MUSC did so in this bid.

The bid was protested on the following grounds:

1. That Davis and Geck was at a competitive disadvantage because it did not manufacture as many of the sutures listed as did Ethicon;

2. That "labyrinth" packaging is a patented Ethicon type of packaging;

3. That Davis and Geck products were rejected without clinical testing, as was required in the IFB;

4. That Davis and Geck was the lowest responsive and responsible bidder.

FINDINGS OF FACT

1. MUSC developed specifications for its requirements in conjunction with known suppliers prior to the issuance of an Invitation for Bids. Both DG and EI were provided working copies of these specifications for the purpose of eliminating items for which there was only a single manufacturer and to ensure understanding of MUSC's requirements.

2. MUSC solicited competitive bids for its suture requirements on April 4, 1986, in accordance with State Procurement Regulation 19-445.2030. MUSC forwarded bid invitations to manufacturers and distributors listed on its bid list and used a "Brand Name or Equal" specification as defined in State Procurement Regulation 19-445.2140, Subsection (A)(2).

3. MUSC referenced manufacturer product numbers and a brief narrative of the product required and stated or equal. Additionally, MUSC used the patented packaging "labyrinth" where the product then in use was the Ethicon product of that type.

4. MUSC used this form of specification to describe the standard of quality, performance and other characteristics needed to meet its requirement, and provided the opportunity for submission of equivalent products.

5. Opportunities for questions for the purpose of clarification and understanding were made available to bidders prior to bid opening and three (3) amendments were issued by MUSC as a result of such opportunities.

6. MUSC evaluated all bids submitted by first determining if the products submitted met the specification and once so determined, by extending the bid prices, discounts and secondary pricing to determine total cost for each lot.

7. A responsive bidder means a person who has submitted a bid which conforms in all material aspects to the invitation for bids. DG submitted a bid which, in part, was responsive to various lot categories and was determined not equal or non-responsive to other lot categories. Its bid was then extended by subtracting the non-responsive items and adding the secondary pricing of other vendors to their bid.

8. The award of this contract was made to EI in accordance with MUSC's determination that EI best met the specifications and submitted the lowest bid prices.

9. Evaluations for equivalency were conducted by MUSC personnel in accordance with product evaluation charts that provided product by product comparisons and determinations for equivalency, and by inquiry to the users of these products. However, no product not then in use was given a clinical trial.

10. Products which failed to comply to the specifications in terms of product composition, dispensing methodology, or material changes to the specification were rejected as not equal.

11. Products which were not bid by the bidder were costed out using secondary pricing to determine the total cost to the State for each lot.

12. MUSC rejected certain of DG's bid items because these were not single strand delivery packaging. This method for dispensing products reflects current MUSC operating room procedures and was either specified in the IFB as single strand or as "labyrinth."

13. "Labyrinth" is a patented form of packaging for suture material. The patent is held by Ethicon. This form of packaging generally denotes single strand delivery but because the IFB sometimes designated "single strand" and sometimes stated "labyrinth", the IFB was ambiguous. No vendor but Ethicon could bid "labyrinth."

14. DG bid its single strand delivery system "Unispence" where single strand delivery was specified but where "labyrinth" was specified it bid non-single strand in some instances. The non-single strand is cheaper.

15. EI won the majority of the contract awarded after being determined the lowest responsible and responsive bidder whose bid met the requirements and criteria set forth in the invitation for bids.

CONCLUSIONS OF LAW

1. The first listed ground of protest is untimely under the authority of In Re: Request for Proposals for Communication Services for the State of South Carolina (No. 7-725-1107200-07/11/83-41) - Request of American Telephone and Telegraph Co., for Review of the 1983-12 Decision of the Chief Procurement Officer. It is essentially a protest of the specifications.

2. MUSC issued a bid using a "Brand Name or Equal" specification. A "Brand Name or Equal" specification is a specification which uses one or more manufacturers' names or catalog numbers to describe the standard of quality, performance, and other characteristics needed to meet the State's requirements and which provides for the submission of equivalent products, in accordance with State Procurement Regulation 19-445.2140, Subsection A, Item 2. When this

purchase specification is used, bidders must be given the opportunity to offer products other than those specifically referenced if those other products will meet the needs of the State in essentially the same manner as those referenced. A "Brand Name or Equal" specification is intended to be descriptive, not restrictive, and is to indicate the quality and characteristics of the products that will be satisfactory and acceptable.

3. Portions of the Davis and Geck bid rejected as non-responsive because of failure to comply with length specifications, color specifications, needle type, suture material specifications are upheld. The specialization of the uses of this suture material is such that these variations are material.

4. Portions of the Davis and Geck bid rejected as non-responsive because not "labyrinth" packaging or without clinical trials are not upheld. The procurement office of MUSC clearly knew that "labyrinth" was a patented term and in many instances placed the phrase "single strand delivery" in the IFB. The two are not interchangeable since "labyrinth" is patented. Where single strand was required, it should have been specified.

5. MUSC reserved the right in its specifications to award this contract "either on the basis of the individual items or on the basis of all items included in the IFB, unless otherwise

expressly provided in Section III (Special Conditions)." IFB, p.3 of 133.

6. MUSC performed certain calculations on the bids of vendors as submitted in response to the IFB to determine cost to MUSC for a three-year period. In performing these calculations MUSC determined that the lowest price for a three-year period could be achieved by placing all orders with Ethicon, except for the suture materials on which Ethicon was deemed non-responsive.

7. The calculations submitted to support this conclusion, that purchasing as much suture material as was responsive to the IFB from a single manufacturer, is unconvincing to the Panel. The lowest responsive bid in each category of suture material is ipso facto the lowest price to the State. "Unit prices will prevail." IFB, p.7 of 133.

8. Further, the contract is with local supply houses, not the manufacturer. Southeastern Hospital Supply is providing Davis & Geck sutures, while Geer Health Services is providing Ethicon sutures. Thus, restriction to the products of a single manufacturer where the supply house will have comparable inventory of another manufacturer at a lower cost cannot be the most cost-effective procedure for the State.

Therefore, the Panel orders that this contract be re-awarded within 30 days in compliance with the IFB, unit prices prevailing as to manufacturer deemed to be the lowest responsive and responsible bidder. If re-award based on the findings and conclusions of this order is unacceptable to the

parties to this proceeding: MUSC, Ethicon and Davis and Geck, then the contract is to be re-bid.

IT IS SO ORDERED.

Hugh K. Leatherman, Sr.
Chairman, S. C. Procurement
Review Panel

Columbia, South Carolina
November 24th, 1986

STATE OF SOUTH CAROLINA	)	BEFORE THE SOUTH CAROLINA PROCUREMENT REVIEW PANEL
	)	
COUNTY OF RICHLAND	)	CASE NO. 1986-10

IN RE:)
)
PROTEST BY CONWAY CHILD CARE, INC.) O R D E R
)

INTRODUCTION

This matter is before the South Carolina Procurement Review Panel pursuant to a request by Conway Child Care, Inc. (CCC) for Review of the Decision of the Chief Procurement Officer (CPO). A hearing was held on November 13, 1986. Health and Human Services Finance Commission (HHSFC) was present and represented by counsel, Mr. Tim Fincher. CCC was represented by its Chief Executive Officer, Mr. Amidu J. Nallo, but was not represented by counsel. Mr. Richard Campbell was present as a representative of General Services but did not participate in the hearing. Representatives of the Horry County Council were also present but did not participate.

After the Chairman called the hearing to order, it was determined that a quorum was not present. The parties participating, HHSFC and CCC, were informed of their right to have a quorum present and both agreed to waive this requirement. During the opening statements, Mr. Luther Taylor arrived and from that point forward, a quorum of the Panel was present.

At the outset of the hearing, the Chairman inquired of Mr. Nallo how he intended to present his protest. The Chairman also explained that the normal procedure of the Panel is that the protestant has the burden of going forward as well as the burden of proof. In the interest of fairness, since Mr. Nallo was alone, the Chairman suggested, and all parties agreed, that HHSFC would present its witnesses first. Effectively, the burden of proof to show that the award of child care contract was made properly was shifted to HHSFC. Mr. Nallo could then elicit the points relevant to his protest on cross-examination. Mr. Nallo was fully informed by the Chairman that he had the right to take the witness stand and make a sworn statement. He chose not to do so. He was further informed that sworn testimony was weighted more heavily than unsworn opening or closing statements. Finally, the Chairman explained that any reference Mr. Nallo made to correspondence, evaluations or other materials in the record that tended to prove his assertions, would be given weight equal to that of sworn testimony as those matters are deemed to be in evidence.

FINDINGS OF FACT

1. HHSFC solicited competitive sealed proposals for the provision of Child Development Services for the fiscal year 1986-87. HHSFC identified the requirements for the provision of service and established the award criteria in the Request for

Proposals (RFP).

2. CCC attended a pre-proposal conference which was held by HHSFC to assist vendors in understanding the award criteria and to answer any questions they might have concerning the RFP. The Panel finds that, based on this meeting and prior responses to the RFP, CCC was familiar with the evaluation process and the award criteria.

3. HHSFC established five-member evaluation panels with knowledgeable, experienced personnel and evaluated the proposals in accordance with the Quality Assurance Standards (QAS) for Child Development which was incorporated into the RFP.

4. A second group of evaluators under the direction of Mr. Robert L. Coffey, Director, Division of Program Evaluation Monitoring, conducted an On-Site Programmatic Review of the child care centers submitting an RFP.

5. Although there is some discrepancy concerning the exact date on which HHSFC conducted the On-Site Programmatic Review of CCC, the Panel finds, and the uncontroverted testimony revealed, that the review was properly done in accordance with the RFP. Whether the precise date was July 23, or 24, 1986, is insignificant. In fact, HHSFC sent two representatives to CCC to ensure objectivity in the review because of past award disputes with the provider.

6. The On-Site Programmatic Reviews assigned a point value in two areas: on-site program review and on-site regulatory

review. These numbers were added to the point value assigned by the five-member evaluation team that rated the responses to the criteria set forth in the RFP. CCC alleged that there were inconsistencies or inequities in the assignment of points for various evaluation factors. The Panel finds, and the uncontroverted testimony demonstrated, that the members of the evaluation team assigned the point values given independently of one another and met to review the results only after their individual determinations had been made. The Panel further finds that it is in full accord with the CPO's determination as to the ratings and the point values assigned.

7. HHSFC established Quality Assurance Standards (QAS) for Child Development which are published and distributed to providers of these services in the state and incorporated these standards in the RFP. The Panel finds that although CCC seems to differ with the QAS as to its philosophy or approach toward child care, the QAS was properly used as part of the evaluation process. Additionally, insofar as CCC's fourth ground of protest relating to whether the QAS should have evaluated care for toddlers differently from infants, it is untimely under the authority of In Re: Request for Proposals for Communication Services for the State of South Carolina (No. 7-725-1107200-07/11/83-41) - Request of American Telephone and Telegraph Co., for Review of the 1983-12 Decision of the Chief Procurement Officer. CCC knew, or should have known, the standards for evaluation soon after receiving the RFP, long before the award was actually made. To the extent that CCC

protests the evaluation process concerning toddlers vis a vis infants, the Panel finds that there are no inequities.

8. HHSFC performed the evaluation outlined above and determined that Horry County Council was the most responsive offeror and that they submitted the proposal most advantageous to the State, taking into consideration price and the evaluation factors set forth in the RFP.

CONCLUSIONS OF LAW

HHSFC counsel, Tim Fincher, orally moved that certain elements of CCC's protest be stricken as being untimely. The chairman took the motion under advisement. To the extent that CCC was protesting solicitations of this contract made in prior years, the Panel rules that this issue is untimely. Consequently, CCC's first ground of protest is deemed to be untimely. All other grounds of protest not specifically addressed previously in this order were timely raised.

No evidence was presented that demonstrated that the CPO was biased in his findings against CCC. Consequently, the Panel concludes as a matter of law the CPO's determinations were fair and properly made. Thus, where not in conflict with this Order, the Panel affirms the CPO's determinations in his Decision dated October 3, 1986, and adopts it as its own.

The Panel, therefore, rules that the contract for the provision of child care was properly awarded to the Horry

County Council.

IT IS SO ORDERED.

Hugh K. Leatherman
Chairman, S. C. Procurement Review Panel

Columbia, South Carolina

December 10th, 1986

STATE OF SOUTH CAROLINA	)	BEFORE THE SOUTH CAROLINA PROCUREMENT REVIEW PANEL
	)	
COUNTY OF RICHLAND	)	CASE NO. 1986-12

IN RE:	)	
	)	
PROTEST BY GENERAL SALES COMPANY, INC.	)	O R D E R
	)	

INTRODUCTION

This matter is before the South Carolina Procurement Review Panel (Panel) pursuant to a request by General Sales Company, Inc. (GS) for a review of the Decision of the Chief Procurement Officer (CPO) as provided by §11-35-4210(5) and §11-35-4410(6) S. C. Code of Laws, 1976.

A hearing was held on December 17, 1986. GS was represented by D. Cravens Ravenel and Jean H. Toal. The Division of General Services was represented by Helen Zeigler. Bill Gambrell, Assistant Attorney General, also provided representation for General Services. John Reed Palmer, Vice President of the successful vendor, CNC Company , was present but participated only as a witness.

FINDINGS OF FACT

1. Competitive bids were solicited for new kitchen equipment August 26, 1986, in accordance with Budget and Control Board Regulation 19-445.2030. The equipment is to be used at two child care centers in the state. General Services

forwarded bid invitations to bidders on its bid list and advertised its requirements in the S. C. Business Opportunities publication.

2. A "Brand Name" or "Equal" specification, as defined in Budget and Control Board Regulation 19-445.2140, Subsection (A)(2), was used. Vulcan Model #E-36 and Champion Model #UHB were used as the specification to best describe the standard of quality, performance, and other characteristics needed to meet its requirements and allowed for the submission of equivalent products. The specification listed the following features required of each to identify the salient characteristics of the equipment sought:

   A. Electric Range, Vulcan Model #E-36, std. finish,22" flue riser, 6 surface units, 240 V. single phase.

   B. Dishwasher, Champion Model, #U.H.B. with panels and hot water booster heater, 220/60/1.

3. The invitation for bid (I.F.B.) (p. 5) included the following terms and conditions:

   "The information listed is for identification and is not to be considered restrictive as to manufacturer. Items offered must be equal in quality and performance to the items described. The right is reserved to reject any offering in which the items offered are considered unsatis-

factory in any manner. The State will determine if minor deviations from the listed features are acceptable." (Emphasis Added)

"Bidders offering other than specified must include the catalog number and manufacturer's names of the item offered in the space provided and attach manufacturers latest catalog and/or specifications sheets."

4. GS was one of two (2) bidders to respond to the bid invitation and offered the models as specified. CNC bid a Garland Model range #686 and a Jackson Machine Model #24BF as an equal to models referenced and offered the products at a cost of $185.00 less than GS. General Services awarded the bid to CNC as the lowest responsive responsible bidder with a price of $6,814.

5. The uncontroverted testimony revealed that the Vulcan range has French plate heating elements for pots and pans rather than coil type elements which are utilized by the Garland model. Both ranges have six surface elements. Each burner is 9 1/2 inches in diameter on the Vulcan, while the Garland has three 6 1/2 inch elements and three 8 1/2 inch units. The oven of the Vulcan has two heating elements and the Garland only has one.

6. Whether the range was to be used in a commercial setting is under dispute. The precise characterization of the setting in which the range is to be used is not as important as the characteristics of the model listed in the specification. These characteristics or features are part of the specifications in this solicitation. The features of the Vulcan model specified establish the minimum level of quality and performance that must be met by another brand in order for it to be deemed equal. The Panel finds, and the evidence reveals, that the Vulcan features are more akin to the features found on a commercial range, while the features of the Garland model are more similar to those of a domestic range. A Brand name or equivalent specification is designed to be descriptive rather than restrictive. As such, the Panel finds that the Garland range does not meet the minimum level of quality and performance established by listing the Vulcan model as the Brand name in the solicitation.

7. The testimony and evidence before the Panel revealed many differences in the Champion dishwasher specified in the I.F.B. and the Jackson model bid by CNC. The Panel declines to delineate the features of the models bid because Mr. Armstrong, Vice President of G.S., testified that no Jackson model is equal to the Champion model specified in the I.F.B. He further testified that he knew

this to be the case and that CNC had bid a Jackson Model within a day of the bid opening.

Consequently, he knew all the facts necessary to lodge a protest on September 17, 1986. Thus, under the authority of §11-35-4210(1) and In Re: Request for Proposals for Communication Services for the State of South Carolina (No. 7-725-1107200-07/11/83-41) - Request of American Telephone and Telegraph Co., for Review of the 1983-12 Decision of the Chief Procurement Officer, GS's protest is untimely as it was not filed within ten days of the time that the protestant knew of the facts giving rise to the grievance.

8. The solicitation was amended to require that the award be made to one bidder for the entire quantity.
9. The I.F.B. (p.5) required that unit price for each item be listed on the bidding schedule. CNC failed to list a price for each item bid. Rather, CNC bid a aggregrate price for all four items.

DISCUSSION AND CONCLUSIONS OF LAW

1. In a letter dated 12/8/86 to Richard Campbell, CNC requested that it be awarded certain costs associated with the equipment due to the delay in the execution of this contract. This request is denied as no testimony or evidence relating to these costs were presented in the hearing.
2. Ground (1) of GS's protest letter dated December 1, 1986, relating to the CPO's decision to allow testimony

concerning the slicing machine and freezer is overruled because no evidence was presented that this testimony was improperly admitted. The Panel finds as a matter of law that the CPO acted within his sound discretion.

3. Ground (3) of the GS's protest alleging that a prior determination by the Panel (In re: Protest of the Decision of the Acting Materials Management Officer in the Matter of the Protest of Contract Award by General Sales Company, Inc., Hobart #1712-R Slicer, Medical University of South Carolina, Bid Number 278-2/4-405-1, Purchase Order Number 255182), is overruled as no evidence of its improper use was presented to the Panel.

The Panel concludes that the differences in quality and performance between the Vulcan and Garland ranges is material. This fact coupled with the failure of CNC to list unit price as required in the I.F.B. causes the bid of CNC to be nonresponsive and the Panel so rules. Since §11-35-4210(7) authorizes the panel to order "relief as justice dictates" the panel therefore concludes, due to GS untimely protest concerning the dishwasher and the all or nothing award provided in the I.F.B., that rebid of the contract for purchase of this kitchen equipment be made.

IT IS SO ORDERED.

Hugh K. Leatherman
Chairman, S. C. Procurement Review Panel

January 15th, 1987

STATE OF SOUTH CAROLINA	)	BEFORE THE SOUTH CAROLINA
	)	PROCUREMENT REVIEW PANEL
COUNTY OF RICHLAND	)	CASE NO. 1987-1

IN RE:	)	
	)	
PROTEST BY PALMETTO COMPUTER SERVICES, INC.	)	O R D E R
	)	

INTRODUCTION

This matter is before the South Carolina Procurement Review Panel (Panel) for administrative review pursuant to South Carolina Code of Laws, Sections 11-35-4210 and 11-35-4410, 1976, as amended. It is a protest of the award of a Multi-Agency Contract for mini computers that was awarded by the Division of General Services to Burroughs Corporation, Inc. (Burroughs). The protest was filed by Palmetto Computer Services, Inc. (PCS), the unsuccessful vendor, with the Chief Procurement Officer (CPO). The CPO, after a hearing, determined that PCS' bid was nonresponsive and that PCS' protest, insofar as it related to the specifications contained in the Invitation for Bids (I.F.B.), was untimely. PCS timely filed a protest of the CPO's decision.

At the suggestion of PCS and with the consent of all parties, the Panel held a hearing on January 22, 1987, which was beyond the time period provided in Section 11-35-4410(6). PCS, the protestant, was present at the hearing and was represented by counsel, Mr. Stanford E. Lacy and Mr. L. Michael

Mills. Burroughs was present and was represented by Mr. Robert T. Bockman and Ms. Christine Klapman, Burroughs' corporate counsel. The Division of General Services was present and was represented by Mr. David Eckstrom and Ms. Helen Zeigler. Recognizing that a quorum of the Panel was not present when the hearing opened, the Chairman asked the parties if they objected to proceeding without a quorum. No objection was noted. A quorum was present when Senator Setzler arrived soon after the testimony began.

At the outset of the hearing Mr Lacy stated that one of the partners in his firm had represented Panel member, Mr. Luther L. Taylor, in a matter unrelated to the protest before the Panel. All parties were given an opportunity to object to Mr. Taylor's participation in the hearing. No objection was heard.

FINDINGS OF FACT

1. On August 27, 1986, the Information Technology Management Office (IMTO) issued an I.F.B. to solicit bids to acquire mini computers for over twenty state agencies and departments. These agencies were, for the most part, if not exclusively, using Burroughs hardware and software.
2. The I.F.B. stated, under the heading, "ADDITIONAL GENERAL PROVISIONS," and the subheading, "AWARD OF CONTRACT", "Software used to meet the State Standards must be bid in vendors (sic) proposal." [Record, p.22].

3. The I.F.B. further stated, under "III. SOFTWARE", "...the vendor must provide and support all of the following software indicated below." [Record, p. 30].

4. The CPO's decision reveals, and PCS through its counsel at the Panel hearing admitted, that PCS received a copy of the I.F.B. on or about September 2, 1986. Mr. Bliss, President PCS, also admitted in testimony that he understood and knew that he would have to supply all items required to be supplied in the I.F.B. on September 2, 1986.

5. On September 18, 1986, Leonard J. Bliss, wrote a letter to Richard Kustrin, Materials Management Officer, who was listed as the contact person for inquiries on the I.F.B. [Record, p. 65]. In this letter Mr. Bliss stated that, "[w]e wish to take issue on the following items ...." The letter raised three points, one of which was the requirement to supply software in order to bid hardware.

6. On October 1, 1986, PCS' counsel, Mr. Lacy, "formally protest[ed] the award of the contract ...." in a letter to Mr. Harold A. Stewart of IMTO. [Record, p. 59]. The first two matters raised in Mr. Bliss' letter of September 18, 1986, were not included in Mr. Lacy's letter.

7. PCS did not include software in the I.F.B. it submitted.

8. Mr. Bliss admitted that he learned that Burroughs declined to license the BTOS operating system software on September 17, 1986 (see also, Record, p. 64).

DISCUSSION AND CONCLUSIONS OF LAW

Determinations as to the timeliness of the various matters under protest are crucial in resolving the issues before the Panel.

Section 11-35-4210(1) of the S. C. Code sets forth the right to protest. In pertinent part, it reads: "The protest, setting forth the grievance, shall be submitted in writing within ten days after such aggrieved persons know or should have known of the facts giving rise thereto, but in no circumstances after thirty days of notification of award of contract." (emphasis added). A protestant may protest the "solicitation or award of a contract" to the appropriate chief procurement officer. [Section 11-35-4210(1)]. This Code section is indicative of one of the seminal policies underlying the Consolidated Procurement Code: the efficient resolution of protests.

The CPO determined Mr. Bliss' letter of September 18, 1986, [Record, p. 65] not to be a protest of the specifications, i.e., the soliciation. [Record p. 9 and 10]

Indeed, Mr. Lacy's letter to Mr. Stewart on October 1, 1986, [Record, p. 59] did not refer to or mention the earlier letter. Additionally, Mr. Bliss' letter was addressed to

Richard Kustrin and not Harold Stewart, the appropriate CPO as required by §11-35-4210(1). Whether Mr. Bliss' letter was, in fact, a protest is not determinative of the issue of whether the protest relating to the specifications requiring the bidding of both hardware and software was timely. Upon receiving the I.F.B., PCS knew or should have known of the items in FINDINGS OF FACT #'s 2 and 3. These matters should have been evident from even a cursory reading of the I.F.B.

From this time, September 2, 1986, PCS had ten days in which to protest the specifications relating to bidding software and hardware contained in the soliciation. Even if Mr. Bliss' letter of September 18th was a protest, it was written more than ten days after the receipt of the I.F.B. Thus, it was not timely as provided in Section 11-35-4210 and the Panel so concludes. Consequently, those items of PCS protest letter to the Panel dated December 11, 1986, [Record, p. 2] relating to the specifications that required the bidding of software and hardware together are untimely and the Panel so determines: specifically, Items 5 and 6 in PCS' protest to the Panel. [Record, p. 3]

The second issue, which is closely related to the supplying of the software but one that is separate and distinct, is whether the I.F.B. was so restrictive as to give Burroughs an unfair advantage "effectively eliminat[ing] the competitive bidding process required by ... §11-35-1510 and related statutes." [Record, p. 2, Protest ground 2] The question of the restrictiveness of the I.F.B. was first raised in PCS's letter of protest to Mr. Stewart dated October 1, 1986.

To be timely, this aspect of the protest must meet the timeframe cited earlier from §11-35-4210. Although there is some evidence that Mr. Bliss thought Mr. William D. Meetze, Branch Manager of Burroughs in Columbia, did not have the authority to decline his licensing request, this evades the issues which are: 'at what point did PCS know or should have known that the I.F.B. was too restrictive,' and, 'was the protest filed within ten days of this time?' The record before the Panel and the uncontroverted testimony revealed that Mr. Bliss knew or should have known no later than September 18, 1986, that the specifications relating to software may have been restrictive. This is not to say, and the Panel declines to rule, that the I.F.B. was, in fact, not too restrictive since the Panel concludes that the issue was not timely raised per §11-35-4210(1). Consequently, Items 2 and 3 of PCS' protest letter dated December 11, 1986, are overruled and the Panel so concludes.

Having found these aspects of the protest untimely and thus in agreement with the CPO, the Panel rules that Item 4 [Record, p. 2] is without merit.

PCS' contention that it was the lowest responsive and responsible bidder and that it should have been awarded the contract is clearly without merit and the Panel so rules. Although PCS submitted the low bid on lots B & C, the failure to bid software is a material deviation from the specifications and compels a determination by the Panel that the bid is nonresponsive. See FINDINGS OF FACT #'s 2 and 3.

The Panel concludes that Burroughs is the lowest responsive and responsible bidder and that it was properly awarded the multi-agency contract for mini computers, Bid #8-205-09/18-86-42-P. The Panel further upholds the Decision of the CPO and incorporates his findings as its own to the extent not in conflict with this Order of Determination.

IT IS SO ORDERED.

Hugh K. Leatherman, Sr.
Chairman, S. C. Procurement
Review Panel

Columbia, South Carolina
February 20th, 1987

STATE OF SOUTH CAROLINA	)	BEFORE THE SOUTH CAROLINA
	)	PROCUREMENT REVIEW PANEL
COUNTY OF RICHLAND	)	CASE NO. 1987-2

IN RE:	)	
	)	
PROTEST OF AUTOMATED LOGIC CORPORATION	)	O R D E R
	)	

M E M O R A N D U M

TO: Members, Procurement Review Panel

FROM: Hogan Brown

RE: Protest by Automated Logic Corporation of Campus Development Project, Phase I, USC-Spartanburg, State Project No. 8794-H34

DATE: March 5, 1987

At the Chairman's direction, the following ruling in the above referenced protest, which was read into the record, has been reduced to writing to avoid any confusion among the parties.

The Panel grants the motion of USC-Spartanburg and the Division of General Services to remand this matter to the Acting Chief Procurement Officer for a rehearing to be held within 15 calendar days. The purpose of this rehearing is to set the record for any future determinations by the Panel. The Acting CPO shall determine the matters presented to him and issue another decision.

The Panel further directs that the Acting CPO take testimony and evidence relating to costs incurred by Automated Logic Corporation that are connected to the protest up to this point. The order of the Acting Chief Procurement Officer shall detail these costs and expenses. The Acting CPO is ordered to make recommendations as to his determination of the appropriateness of the costs presented to him.

These determinations and costs shall then be forwarded to the Panel within 15 calendar days of the rehearing in order for the Panel to review these determinations. The Panel will accept, reject or modify these costs and other determinations. Costs will be finally determined by the Panel without regard to whom a contract is finally awarded.

If you have any questions, please contact me at 734-2774.

WHB/bgo
cc: Mr. Ted Eilenberg, Assoc. Chancellor for Business Affairs
Mr. J.B. Clonts, Jr., Barber-Colman
Mr. John Miner, Automated Logic Corporation
Mr. William C. Neel, CAN Engineering
Mr. Max Holland, U.S.C. of Spartanburg
Porter C. Craighead, State Engineers Office
Richard W. Kelly, Division of General Services
Helen Zeigler, Esq., Division of General Services
Joseph M. McCulloch, USC-Spartanburg
David C. Eckstrom, Esq., Office of the Attorney General
George R. Ferrell, Johnson Controls
Casey Borowski, Automated Logic Corporation
Bill Clements, Division of General Services

STATE OF SOUTH CAROLINA	)	BEFORE THE SOUTH CAROLINA
	)	PROCUREMENT REVIEW PANEL
COUNTY OF RICHLAND	)	CASE NO. 1987-3

IN RE:	)	
	)	
PROTEST BY J & T TECHNOLOGY, INC.	)	O R D E R
	)	

This matter is before the South Carolina Procurement Review Panel (Panel) for administrative review pursuant to the South Carolina Code of Laws, §§11-35-4210 and 11-35-4410, 1976, as amended. It is a protest of the award of a term contract for personal computers for educational institutions and organizations of the state. The protest was filed by J&T Technology, Inc. (J&T) because its bid was deemed to be nonresponsive as to the PC/XT and PC/AT lots within the request for proposals (RFP). After a determination adverse to J&T was issued by the Chief Procurement Officer (CPO), J&T timely filed a protest with the Panel pursuant to the South Carolina Code Sections cited above.

A hearing was held by the Panel on June 10, 1987. A quorum of the Panel was present. J&T was present and was not represented by counsel. The Division of General Services was present and represented by Ms. Helen Zeigler. The successful vendors for the lots under protest were notified of the hearing but choose not particiate in the proceeding.

STATEMENT OF FACTS

The Information and Technology Management Office (ITMO) issued an Intent to Award the contract on March 17, 1987, which was subsequently amended on March 20, 1987, to include items which were omitted. On March 25, 1987, the CPO received a letter of protest from J&T stating that the "reason for this protest is our proposed prices were significantly lower than those you intend to accept." (Record, p.44) The CPO responded by letter, dated April 1, 1987, and informed J&T that its bid was rejected because, in sum, it was not responsive and that price was only one of the factors considered in a RFP. (Record, p.30-36) This letter also requested a response from J&T if it wished to continue the protest. J&T did so in a letter dated April 27, 1987, which stated "[w]e wish to carry on with our protest of the manner in which the your [sic] department handled and awarded the Educational Computer #1/7/205-12-16-86-42P.... It is our contention that the state placed too much weight on minor evaluation factors and not enough on price for category B. This is evidenced in the prices accepted by your office for category B items." (Record, p.27).

The lack of precision in stating the protest presumably caused the CPO to restate the issue for resolution as, "[w]as the evaluation and award conducted in accordance with Section

11-35-1530, (7) of the Consolidated Procurement Code and the evaluation criteria contained in the request for proposal." (Record, p.8) In a letter dated May 21, 1987, J&T requested a review before the Panel and stated that its grievance remained the same as it was stated in its April 27, 1987, letter. In its opening statement, J&T restated its protest as being based upon the fact that the bid was rejected for what it claimed to be nonmaterial deviations from the specifications.

1. In order to be responsive, an offeror must meet all the material aspects of the solicitation. (§11-35-1410(7)).

(a) Section 4.3 and 4.3.1(a) of the RFP provided:

> 4.3 EDUCATION AND SUPPORT
> Education and continuing support for all equipment purchased must be available during and after the term of any contract(s) established. Proposing vendors will provide detailed information (not sales brochures) stating how the vendor will provide the following services. Responses to this section must provide sufficient information for evaluation of value and acceptability." [Emphasis added]
>
> 4.3.1 Education and Training
> Response to this section should identify the education and training available, detailing the locations at which training is available, the degree of expertise and audience which the training addresses and the cost of that training. Specific areas which should be addressed are:

(a) Technical training

It is likely that one or more purchasers operating under these contract(s) will elect to establish or continue a self-maintenance program. Proposing vendors should be capable of providing training in the following major categories on a continuing basis.

1. Repair and installation of hardware items - instruction sufficient to train an individual to be a competent service technician.

2. Intensive software training - instruction sufficient to train an individual to respond to question (sic) and problems received from end users.

3. Special feature training (e.g., networking, communications).... [Emphasis added]

2. Mr. Phillip Pickard, the employee or agent of J&T who responded to the solicitation on behalf of J&T, testified that he considered the "should" in Section 4.3.1 to be permissive rather than mandatory. Consequently, J&T qualified its response to Section 4.3.1(a): "J&T Technology, Inc., will not participate in any technical training as outlined in this section." (Record, p. 85). The unwillingness of J&T to provide technical training was reiterated by Mr. Pickard, in sworn testimony, during questioning by the Panel.

3. The Panel finds that the language of Section 4.3 makes it clear that it is related to, and must be read in conjunction with, Section 4.3.1. The Panel further finds that it would be illogical or inconsistent to read "should" in Section 4.3 as being permissive, thereby making the training called for in 4.3.1. optional. Rather, "should" is used in an auxilary function to express an obligation, i.e., if you must provide

education and continuing support, as required in Section 4.3, a responsive bid should identify the education and training available. In sum, the Panel finds that 'should' in Section 4.3.1., when read with Section 4.3, establishes a mandatory requirement for a vendor to supply the training delineated in 4.3.1. The Panel further finds that J&T had a period of time outlined in the RFP during which it could have sought a clarification of Section 4.3.1., if J&T deemed it necessary. (Record, reverse side of p. 91) No evidence was presented that J&T asked for clarification during this time allowed by the RFP.

4. The Panel further finds that Section 4.3.1(a) provides evidence that this section is material. When a vendor trains a user "to be a competent service technician" with regard to hardware and a vendor provides intensive software training in order for "an individual to respond to question (sic) and problems . . .", the state will save money by reducing the need for routine service calls. Further, the uncontroverted testimony of John Watson, Director of System Engineering, University of S. C., further supports this finding of the Panel, as Mr. Watson testified that technical training was sought to reduce the need for service calls thereby saving the state money.

5. Section 11-35-1530(6) of the S. C. Code authorizes, <u>but does not require</u>, discussion with responsible offerors after the R.F.P. has been submitted, but prior to award, in order to

assure full understanting of, and responsiveness to the solicitation requirements of the R.F.P. J&T failed to submit several items that were required by the solicitation in order to evaluate the equipment in its proposal. The Panel finds that these materials (Record, pp.49-50) were necessary to determine whether the equipment bid was responsive to the RFP. The record is replete with evidence of attempts to obtain and attempts to supply the hardware diagnostic and service manuals and the parts list. The Panel finds that these manuals and the parts list were a material component of the solicitation. Ultimately, a deadline was set by ITMO for the receipt of these items, which J&T missed by one day. J&T admitted it failed to meet this deadline. The burden is on the vendor to supply all of the information required by the solicitation when the RFP is submitted. Had ITMO not requested the material which J&T failed to supply in its bid package, ITMO could have properly rejected the bid as nonresponsive under §11-35-1530(c) of the South Carolina Code and Section 8.4 of the RFP. (Record, p.123) The Panel finds that J&T did not meet its burden to supply the material required by the RFP and consequently failed to meet an essential requirement of the solicitation.

6. The Panel finds, and the evidence reveals, that the evaluation criteria contained in Section 7 of the IFB was properly applied in this solicitation. The Panel further finds that any grievance based upon the relative weight given the different factors in the evaluation criteria is untimely under

§11-35-4210, as it was not raised until April 27, 1987, while the RFP was issued in October 1986.

CONCLUSION OF LAW

The Panel concludes that, implicit under §11-35-4210 is the requirement that protestants state their grievance with enough specificity to put all parties on notice of the issues to be decided by the CPO and the Panel. The protestant cannot alter or modify its grievance as the protest develops except as permitted by §11-35-4210. The state is under no obligation to reformulate or perfect a protestant's grievance. The Panel concludes, as a matter of law, that J&T met the bare minimum of what is required under §11-35-4210 in articulating its grievance.

The Panel concludes that, having found that J&T failed to meet the essential requirements of the RFP and thereby it materially deviated from the material aspects of the RFP, J&T's bid is nonresponsive. Based upon Findings of Fact Numbers 3 and 4, the Panel is compelled to conclude J&T's proposal was nonresponsive. The evaluation criteria of the RFP clearly states that the mandatory requirement must be met in order to properly be awarded the contract.

J&T's allegation that it should have been awarded the contract is clearly without merit and the Panel so con-

cludes. A proposal that is nonresponsive cannot, by definition, be the proposal that is most advantageous to the state.

Having reached the aforementioned conclusions, the Panel denies J&T's request for lost profit on the contract during this protest.

The Panel upholds the decision of the CPO and accepts his determinations as its own to the extent that those determinations are not in conflict with those of the Panel.

THEREFORE, the Panel rules that J&T's proposal was properly rejected as nonresponsive and the intent to award stands as issued by ITMO.

IT IS SO ORDERED.

Hugh K. Leatherman
Chairman, South Carolina
Procurement Review Panel

July 13TH, 1987
Columbia, South Carolina

(2941S)

STATE OF SOUTH CAROLINA)
) BEFORE THE SOUTH CAROLINA
COUNTY OF RICHLAND) PROCUREMENT REVIEW PANEL
CASE NO. 1987-3b

IN RE:)
)
PROTEST BY FEIMSTER-PETERSON, INC.) O R D E R
)

June 15, 1987

Mr. Nicholas S. Papleacos
Stokes, Shapiro, Fussell, Fox & Wedge
2300 First Atlanta Tower
Atlanta, Georgia 30383

RE: Feimster-Peterson, Inc.
State Project No. J16-9215, CPOC-P-87-020

Dear Mr. Papleacos:

In response to your request for reimbursement of certain costs relating to the procurement protest filed by Feimster-Peterson, Inc., the South Carolina Procurement Review Panel denies your request.

The authority of the Review Panel to award costs granted in §11-35-4210, South Carolina Code of Laws, 1976, as amended, is discretionary. This statute in no way compels the Review Panel to grant reimbursement. Although the costs for which you seek reimbursement may not always be part of seeking a state contract, they are to be expected and are generally a normal cost of doing business with the state. Consequently, the Review Panel concludes that the costs in this instance should be borne by the protestant.

Sincerely,

Hugh K. Leatherman
Chairman, S. C. Procurement Review Panel

cc: Mr. Jay A. Flanagan, P.E.
Chief Procurement Officer for Construction
Mr. Eruch Tata
S. C. Dept. of Mental Retardation
Ms. Helen Zeigler
Legal Counsel, Div. of General Services

(2763S)

STATE OF SOUTH CAROLINA	)	BEFORE THE SOUTH CAROLINA
	)	PROCUREMENT REVIEW PANEL
COUNTY OF RICHLAND	)	CASE NO. 1987-4

IN RE:	)	
	)	
PROTEST BY HARRIS-LANIER, INC.	)	O R D E R
	)	

This matter is before the South Carolina Procurement Review Panel (Panel) for administrative review pursuant to §§11-35-4210 and 11-35-4410 of the South Carolina Code of Laws, 1976, as amended. It is protest of the award of a contract for dictation equipment for use at the Medical University of South Carolina (MUSC). The protest was filed by Harris Lanier, Inc. (HL) based upon the contention that the bid of Dictaphone Corporation was not responsive to the Invitation for Bid (IFB) and that, consequently, HL should be awarded the contract as the next lowest responsive and responsible bidder. Alternatively, in lieu of a re-award, HL seeks to have the contract rebid.

The Chief Procurement Officer (CPO), Harold Stewart, determined that the statutes and regulations governing this solicitation had been complied with, and that the award of the contract to Dictaphone was proper. From this determination, HL requested a further review by the Panel.

An administrative hearing was held by the Panel on June 30, 1987. A quorum of the Panel was present. HL was present

and represented by counsel, Messrs. Dwight Drake and Thomas Mullikin. Dictaphone Corporation was notified of the hearing and was represented by an employee, Mr. Frank McCarthy, who made a brief unsworn statement but did not otherwise actively participate in the hearing. The Division of General Services (GS) was present and represented by counsel, Mr. Craig Davis. Finally, MUSC was present and represented by counsel, Mr. Michael Hughes.

After counsel for HL indicated in the opening statement that HL sought to rely on the testimony before the CPO and not call witnesses, GS moved to dismiss the protest because that testimony was unsworn which would prevent the record before the Panel from being certifiable to the circuit court. The Chairman denied the motion to dismiss when HL indicated it was willing and able to present witnesses. The protestant has the burden of going forward as well as the burden of proof on the issues raised.

STATEMENT OF FACTS

1. The IFB states that:

"The following equipment will be located in the main hospital complex. 2 ea. digital recorders...."

(Record, p.130)

2. Under the heading, "GENERAL TECHNICAL AND FUNCTIONAL REQUIREMENTS", the IFB stated:

"1. Each digital recorder must have a minimum of 20 hours of recording time with redundancy." (Record, p. 130)

The Panel finds, and the uncontroverted testimony revealed, that this effectively required the recording system to be capable of providing forty hours of recording time with redundancy, or 80 hours total.

3. The Panel finds, and the uncontroverted testimony and evidence revealed, that Dictaphone bid one, rather than two, recorders. The Panel further finds that the Dictaphone recorder met the specification concerning taping capacity.

4. In conformity with Regulation 19-445.2140, the IFB provided:

> "The information listed [in the specification] is for identification and is not to be considered restrictive as to manufacturer. Items offered must be equal in quality and performance to the items described." (Record, p. 136)

5. HL alleged that had it known one recorder was acceptable, rather than two, it could have bid a single recorder system that cost less than the Dictaphone single recorder. The Panel finds that, based on the conflicting testimony of HL's witnesses, it failed to establish that this was the case.

6. HL further alleged, in its protest letter requesting a review by the Panel, that Dictaphone's bid was nonresponsive concerning the software portion of the specifications. The Panel finds that HL failed to establish that the software portion of Dictaphone's bid was nonresponsive.

7. Ms. Aileen Black, Director of Physician Support Services, MUSC, made the initial request for new digital dictation equipment. (Defendant-GS exhibit #2) Ms. Black testified that her objective was to obtain equipment that would assure that dictating services were available on a twenty-four hour, 365 day, basis. The Panel finds that a two recorder system provides this type of back-up coverage should one recorder malfunction.

8. Ms. Rosalind Giddens, Procurement Manager, MUSC, testified that the information she received from Ms. Black did not indicate that a two recorder system was needed for the purpose of providing back-up capability. She further testified that the question whether two systems were needed for back-up purposes did not arise until after the bids were submitted, during the evaluation process. Her testimony was corroborated by Mr. Fred Woodham, Director of Procurement, MUSC.

9. The Panel finds, and the testimony revealed, that during the evaluation it was determined by MUSC and GS that the forty-hour taping requirement, with redundancy, set the level of function and performance for the equipment solicited. Thus, the key to the responsiveness issue, as determined by MUSC and GS, was the taping capacity rather than the ability to provide back-up service, if one recorder malfunctioned.

10. Ms. Judy Heward, Regional Systems Manager for Dictaphone, testified, and the Panel finds, that the Dictaphone system is very reliable but it could malfunction as any machine can, and cause MUSC to be without dictating service.

11. The Panel finds that Dictaphone never sought a written clarification of the specifications or sought to have an addendum issued by ITMO in order to determine whether bidding a one-recorder system would be responsive to the IFB.

DISCUSSION AND CONCLUSIONS OF LAW

The remaining portion of HL's protest alleges that Dictaphone was not responsive to the solicitation due to their failure to bid a dictation system with two recorders as called for in the IFB. This is not a conventional 'brandname or equal' protest where the Panel must determine if one piece of equipment is equal in function and performance to another piece of equipment. Whether a dictation system with one recorder is equal in function and performance to a two-recorder system, as specified in the IFB, is dependent upon the essential requirements for the use of the equipment solicited. In other words, if the primary objective was to acquire equipment that would provide a back-up system, then only HL would be responsive to this solicitation. On the other hand, if the primary concern was that of taping capacity, which was met by both Dictaphone and HL, Dictaphone would have properly been awarded the contract as the low dollar bidder.

The uncontroverted testimony revealed, and the Panel found (See Statement of Facts #8 and #9), that the determination of the most important feature of this equipment was made after the bid was submitted. This sort of after-the-fact determination does not further the purposes and policies

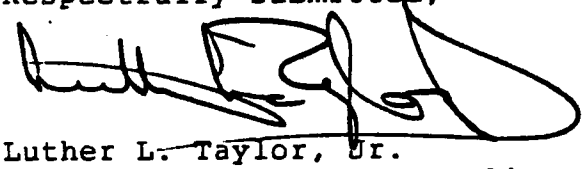
of the Procurement Code, as outlined in §11-35-20 of the 1976 Code. [See specifically, subitems (d), (e), (g), and (m)]

The Panel concludes that MUSC was remiss in putting together specifications that would not indicate to vendors which type of equipment was best for their needs, i.e., back-up capability or taping capacity. Further, the Panel concludes that GS was remiss in not performing any real oversight in the handling of this solicitation. This duty is codified in §11-35-1580(b) and (d) of the 1976 Code. [See also §11-35-20(k)(m)] In short, GS should not wait until a problem arises before taking a critical look at solicitations for this type of procurement. If the Code had not contemplated an oversight responsibility on the part of GS, agencies like MUSC would have been given the authority to make these procurement independent of GS.

Due to the uncertainty surrounding MUSC's needs and Dictaphone's failure to seek written clarification through an addendum, the Panel refuses to concur with the CPO in his determination that bidding a one-recorder system was responsive. Consequently, for the foregoing reasons, the intent to award the contract for IFB#2-600-1200500-02/10/87-P, as suspended by GS, is revoked and the contract is to be rebid. Further, the Panel orders and directs MUSC to clearly set forth whether its needs would be met with a recording system that provides a back-up capability or whether a single recording system with a certain taping capacity is sufficient.

IT IS SO ORDERED.

Respectfully submitted,



Luther L. Taylor, Jr.
Vice Chairman, South Carolina
Procurement Review Panel

Columbia, South Carolina

July 30, 1987

STATE OF SOUTH CAROLINA	)	BEFORE THE SOUTH CAROLINA
	)	PROCUREMENT REVIEW PANEL
COUNTY OF RICHLAND	)	CASE NO. 1987-5

IN RE:	)	
	)	
PROTEST BY OHMEDA COMPANY	)	O R D E R
	)	

This matter is before the South Carolina Procurement Review Panel (Panel) for administrative review pursuant to the South Carolina Code of Laws, §§11-35-4210 and 11-35-4410, 1976, as amended. It is a protest of an intent to award a contract for thirty-two incubators to be used at the Children's Hospital which is part of the Medical University of South Carolina (MUSC). The protest was filed by Ohmeda Company, Inc., (OC). OC asserts that Air-Shields Vickers, Inc. (ASV), the vendor deemed to be the lowest responsive and responsible in the intent to award, submitted a nonresponsive bid. The Chief Procurement Officer (CPO) upheld the initial intent to award and declared ASV's bid to be responsive to the solicitation. OC then requested a review before the Panel.

A hearing was held by the Panel on August 6, 1987. A quorum of the Panel was present. OC was present and was represented by counsel, Ms. Elizabeth Crum and Mr. David Hom. The Division of General Services was present and represented by Ms. Helen Zeigler and Mr. Wayne Rush as counsel. ASV was present and represented by Mr. Robert Fryling. MUSC was present and represented by Mr. Michael Hughes.

INTRODUCTION

The crux of OC's eleven-ground protest relates to the responses ASV provided on page 13 (Record, p. 115) of the Invitation for Bids (I.F.B.). These responses relate to the radiant warmer, the deluxe drawer kits, the tube support and the phototherapy units.

FINDINGS OF FACT

1. Both the OC, Ohio and the ASV, C-100 models were approved for this solicitation. (I.F.B., p. 5; Record, p. 70) Therefore, these models were deemed to be responsive prior to the time the solicitation was mailed to the vendors.

2. The Panel finds and the uncontroverted testimony revealed that effectively, OC and ASV are the only two vendors that can supply the type of incubator/isolette that meets the needs of MUSC in the environment in which it will be used. The Panel further finds that the vendors knew and understood that they were the only two companies that could bid on this solicitation at the time the bids were submitted, as no evidence was presented that any other vendors sought to have their equipment approved as provided in the I.F.B. (See IFB, p. 5; Record, p. 70).

3. The I.F.B. called for vendors to supply equipment in addition to the incubator/isolette. Those items relevant to

this protest include tubing supports, radiant warmers and phototherapy units.

4. With regard to the phototherapy units, ASV submitted the following responses to the I.F.B.:

> Describe phototherapy lamp (to be included with unit): Air-Shields maufactures [sic] three distinctly different excellent phototherapy systems, but our market research indicates most hospitals don't require a separate phototherapy light.

(Record, p. 109)

> 32.ea. Ohmeda Mfr. 304-3300-900
> Phototherapy Units $ N/A $ N/A
> Air-Shields manufactures three types of phototherapy systems, but each are mobile and are not permanently affixed to the unit. The PT1400-2 and the Shannon unit can both be used in conjunction with the C-100 isolette. I will include literature on both of these units.

(Record, p. 115)

The Panel finds that these responses effectively qualified ASV's bid, thereby creating an uncertainty as to whether the phototherapy units were, in fact, included in the bid and bid price.

5. Mr. Michael Hanna, East Coast Sales Manager, ASV, testified that he worked with Mr. David Grimes, who prepared the ASV bid, in an oversight capacity concerning the responses to the

I.F.B. Mr. Hanna testified that the response of "N/A" on page 13 of the I.F.B. (Record, p. 115) was designed to prevent OC from knowing the costs of the individual items. His explanation of the use of "N/A" in the column calling for a price concerning the radiant warmer, deluxe drawer and tube support was that these items were not needed with the C-100. Thus, since the items were not being bid, no price was required for these items. As to the phototherapy unit, Mr. Hanna testified that the use of "N/A" in the price column meant that ASV would supply the units requested at no additional cost. In other words, the phototherapy units would be provided as part of the total price bid of $186,260.

6. The I.F.B., Page 2 (Record, p. 65) under "INSTRUCTION TO BIDDERS", #3 states: "Quote prices on units specified with packing included."

7. Ms. Linda Pittman, Procurement Specialist, MUSC, testified she telephoned Mr. David Grimes but spoke with Mr. Michael Hanna. The Panel finds, and the testimony revealed, that Ms. Pittman made the telephone call to clarify the response ASV made regarding the phototherapy unit and the other items on p. 13 of the I.F.B. (Record, p. 115). Although she testified that she considered ASV to be responsive to the I.F.B. prior to the telephone call, there was enough uncertainty in her mind to

necessitate the telephone call to Mr. Grimes. Indeed, her testimony on this point (i.e., her comment that she felt ASV was responsive prior to telephoning Mr. Grimes) is inconsistent with the memo she wrote, by her own admission, very shortly after the telephone call. In that memo, (Record, p. 41) under #4, she wrote: "The phototherapy unit was not bid but literature was supplied for two (2) units."

8. The Panel finds, and the uncontroverted testimony revealed, that ASV caused the uncertainty as to whether the phototherapy units were, in fact, part of the items included in the I.F.B. ASV, and only ASV, could have prevented this ambiguity and inconsistency among the responses on page 13 of the I.F.B. (Record, p. 115).

9. Based on the foregoing findings of fact, the Panel further specifically finds that the responses relating to the phototherapy units were ambiguous.

DISCUSSION AND CONCLUSION OF LAW

The ambiguity caused by ASV regarding the responses to phototherapy goes to the very essence of the solicitation. To cause an ambiguity of this nature and then cure it, after the bids are submitted, does not further the policies of the Procurement Code when there is effectively only one other

vendor competing for the state's business. (See §11-35-20(d), (e), (f), (h), 1976 S. C. Code, 1976, annotated) Mr. Hanna, at the time Ms. Pittman called, had to presume that they were the low bidder. In this instance, there would have been no need to confirm or clarify a response of vendor who had not submitted the low bid (either in first instance or after the other vendors have been deemed nonresponsive). If Mr. Hanna indicated to Ms. Pittman that the phototherapy units were not part of the bid, he knew that ASV would not be awarded the contract. Unquestionably, correcting this ambiguity, i.e., mistake, caused ASV to be deemed the lowest responsive and responsible vendor in the notice of intent to award. This violates §11-35-1520(7) and (8) and Regulation 19-445.2085(B) promulgated pursuant thereto, and the Panel so concludes.

The Panel further concludes that the ambiguity regarding the phototherapy and the failure to quote unit prices, as required by the I.F.B., causes ASV to be nonresponsive to the I.F.B.

Therefore, for the foregoing reasons, the Panel concludes that bid #2-410-1200500-3/24/87A should be awarded to OC and not ACV. The Panel thus overrules the Order of the CPO.

Having awarded the contract to OC, the Panel refuses to grant OC's request for bid prep or other costs as, in this instance, these costs are part of the cost of doing business with the state.

IT IS SO ORDERED.

Hugh K. Leatherman
Chairman, S. C. Procurement
Review Panel

Columbia, South Carolina
August 13th, 1987

STATE OF SOUTH CAROLINA	)	BEFORE THE SOUTH CAROLINA
	)	PROCUREMENT REVIEW PANEL
COUNTY OF RICHLAND	)	CASE NO. 1987-7
IN RE:	)	
	)	
PROTEST BY CHI CORPORATION	)	O R D E R
	)	

August 26, 1987

Mr. Richard Campbell
Materials Management Officer
Division of General Services
800 Dutch Square Blvd.
Suite 150
Columbia, S. C. 29210

Re: Chi Protest of Bid #6/7-205-1115200-05/15/87

Dear Richard:

Having considered your determination as to the timeliness of the above referenced protest, the Procurement Review Panel vacates your decision and remands the matter to your office to take evidence from any party, by affidavit, or otherwise, to build a more complete record regarding the timeliness issue. Should you affirm your initial decision, the Panel would then be in better position to consider this matter, if further review is sought. If it is determined that Chi should be allowed to go forward with its protest, you may then schedule a hearing on the merits of Chi's protest.

If you have any questions, please contact Hogan Brown for assistance.

Sincerely,

Hugo K. Leatherman

cc: Helen Ziegler
John R. Thome

(3215S)

STATE OF SOUTH CAROLINA	)	BEFORE THE SOUTH CAROLINA
	)	PROCUREMENT REVIEW PANEL
COUNTY OF RICHLAND	)	CASE NO. 1987-8

IN RE:	)	
	)	
PROTEST BY J.A. METZE & SON, INC.	)	O R D E R
	)	

This matter is before the South Carolina Procurement Review Panel (hereinafter "Panel") for administrative review pursuant to Section 11-35-4210(5) and Section 11-35-4410(5), South Carolina Code of Laws, 1976, as amended, as a result of a Bid Protest filed under Section 11-35-4210(1), South Carolina Code of Laws, 1976, as amended, and a Request for Review of the Determination issued by the Chief Procurement Officer for Construction (CPO) from that Protest pursuant to his authority granted by Section 11-35-4210(2) and Section 11-35-4210(3).

BACKGROUND

On or about June 10, 1987, the Division of General Services issued an invitation for construction bids for the upfitting of the Robert Mills Building and Addition, State Project No. 9064-F12. The date on which the bids were due to be turned in was initially set for July 9, 1987, and was subsequently changed to July 21, 1987. On July 22, 1987, the Division of General Services issued a Notice of Intent to Award the contract to Carolina Construction Company ("Carolina").

On July 29, 1987, J. A. Metze and Son, Inc. ("Metze") timely filed a protest alleging that Carolina Construction had failed to list subcontractors as required by South Carolina Code of Laws, §11-35-3020 (Cum. Supp. 1986). That section provides:

> (b) Bid Acceptance. In lieu of Section 11-35-1520(7), the following provision shall apply. Bids shall be accepted unconditionally without alteration or correction, except as otherwise authorized in this code. The using agency's invitation for bids shall set forth all requirements of the bid including but not limited to the following:
>
> (i) Any bidder or offeror in response to an invitation for bids shall set forth in his bid or offer the name and the location of the place of business of each subcontractor who will perform work or render service to the prime contractor to or about the construction, and who will specifically fabricate and install a portion of the work in an amount that exceeds the following percentages: Prime contractor's total bid up to three million dollars 21/2% Prime contractor's total bid is three million to five million dollars 2% Prime contractor's total bid is over five million dollars 11/2%.
>
> (ii) Failure to list subcontractors in accordance with this section and any regulation which may be promulgated by the board shall render the prime contractor's bid unresponsive.
>
> (iii) No prime contractor whose bid is accepted shall substitute any person as subcontractor in place of the subcontractor listed in the original bid, except with the consent of the awarding authority, for good cause shown.
>
> (iv) The using agency shall send all responsive bidders a copy of the bid tabulation within ten working days following the bid opening.

Specifically, Metze alleges that Carolina failed to list subcontractors or suppliers, or failed to list itself in lieu of subcontractors or suppliers, for the following work or supplies: venetian blinds, finished carpentry/millwork, and folding doors and partitions; the amounts for each, according to Metze, exceeding 2 1/2% of Carolina's base bid or, in this case, exceeding $13,575.00. (Record, p. 1).

The State Engineer, Jay A. Flanagan, conducted a hearing on Metze's protest on August 26, 1987. All interested parties were present. In his September 4, 1987, decision, the CPO determined that the bid submitted by Carolina had complied with §11-35-3020 and the invitation for bids, that the bid was responsive, and that Carolina was the low bidder.

As a result of Metze's request for further review of this protest, the S. C. Procurement Review Panel convened a hearing on September 22, 1987. A quorum of the Panel was present. The Division of General Services was present and represented by Ms. Helen Zeigler. The protestant, Metze, was present and represented by Mr. W. Duvall Spruill. The respondent, Carolina, was present and represented by Mr. Robert E. Kneece, Jr.

At the beginning of the hearing Carolina moved to dismiss the partitions from the items under protest as being untimely raised because they were not part of Metze's initial letter of protest to the CPO. (Record, pp. 21, 26). The record below reveals, however, that the issue surrounding the partitions was fully litigated at the CPO hearing and that

Carolina did not object to the consideration of this issue even though it was not part of the protest at that time.

On the main issues before the Panel, Metze presented evidence tending to show that Carolina artificially broke down work into categories, the dollar amount of which was below the 2 1/2% threshold. Mr. J. A. Metze, Jr. testified that Metze received the following quotes for the work under protest:

1.	Venetian blinds for Robert Mills Building and new addition --	
	Joyce Marie Shade Shop	$30,983
	The Shade Shop	$37,375
2.	Folding Door and Folding Partitions --	
	Bass Specialties	$15,447
	McDonald's	$18,000
3.	Finished Carpentry/Millwork (including Flush and Panel Doors) --	
	Columbia Lumber	$28,670
	Sumter Lumber	$31,614

In each case the cost of the work in question well exceeds the 2 1/2% threshold of Metze.

According to Carolina's evidence, it broke down the same work listed above as follows:

1.	Venetian Blinds for Robert Mills Building Addition ("new building") --	
	Kenny Manufacturing	$9,072.94
2.	Venetian Blinds for Robert Mills Building ("old building") --	
	Lonnie Miracle - Decorator Supply	$10,990.00
3.	Folding Door --	
	Bass Specialties	$2,503.70

4.	Folding Partitions -- Bonitz	$12,800.00
5.	Flush Doors -- Caroland Doors	$7,322.00
6.	Panel Doors -- R&D Enterprises	$9,960.00
7.	Finished Carpentry/Millwork Brazzell's Home Improvement	$7,332.00

Metze presented evidence that the bid of $7,322 from Caroland Doors was unusable because the quote was for doors which did not meet bid specifications. Carolina offered evidence that it also had a quote of $7,980 from Pleasant's Hardware for the same door.

Metze further presented evidence that the bid of $10,990 from Lonnie Miracle was not adequate because it was for less than all the venetian blinds required for the old building by the specifications. Carolina conceded that Miracle's bid was for less than all the windows and offered a new bid from Miracle dated September 21, 1987, for $13,372.80, covering all the venetian blinds required for the old building. This new bid was solicited well after the bid opening and after the hearing below.

Mr. Miracle testified that he did not visit the site to verify the number of windows. He also testified that his new bid was arrived at by figuring an average unit cost for a blind and multiplying that figure by the total number of blinds. Mr. Miracle admitted that irregular-shaped blinds, such as for arched or circular windows, have a higher materials

cost that normal rectangular blinds. Evidence was also presented that the cost of installing irregular blinds is higher. It was established by Metze that Miracle's first quote did not take into account at least 17 irregular shaped blinds and 44 rectangular blinds.

Regarding the finished carpentry and millwork, Carlisle Smith of Carolina testified that he used his notes from a verbal quote received from Columbia Lumber to solicit a verbal quote from Brazell's Home Improvements before bid date, July 21, 1987. The effect of soliciting the Brazzell bid was to break out the doors from the carpentry and millwork, thus bringing both items under the 2 1/2% threshold. The quote from Brazell covered every item of Columbia's quote except twenty-eight, four-panel wood doors and ninety-four, flush paint grade doors. Mr. Smith admitted, and the record reveals, that, but for the absence of the doors, the written quote from Brazell is identical to that of Columbia Lumber. Mr. Smith also admitted that the specifications do not contain the exact language found in Columbia Lumber's written quote. Both the written quote from Columbia Lumber and the written quote from Brazell, according to Mr. Smith, were received after bid day.

Finally, it was brought to the Panel's attention that Carolina had solicited after the bid opening at least one of the bids allegedly relied upon by it in preparing its bid. Carolina admitted that the bid received from Bass Specialties breaking down the work concerning the folding door and folding partitions was not requested or received prior to bid day. Ms.

Timmons of Bass Specialties testified at a supplemental hearing before the CPO that Carlisle Smith, President of Carolina, contacted her on or about August 18, and requested that she break down Bass' bid to list separately the folding door. Ms. Timmons stated that Bass did not want to break down its bid and probably would not have done so if Carolina had not apparently received award of the contract. It was also uncontroverted that Carolina approached McDonald and Columbia Lumber after the bid to get these subcontractors to break down their bids into smaller categories.

Carolina claims that it had an oral quote from Butler Hardware for the folding door. However, the only written evidence of this quote indicates that it was given September 21, 1987, a day before the hearing before the Panel.

No evidence other than the testimony of Carlisle Smith was offered before the Panel to support Carolina's assertion that it received prebid oral quotes from the subcontractors it allegedly relied upon in preparing its bid. Smith, in sworn testimony before the CPO, stated that he did not write down the date on which he received verbal quotes. Counsel for Carolina interjected in the hearing before the Panel that Smith's notes were 'scrambled'.

FINDINGS OF FACT

1. Carolina did not object at the hearing before the CPO to the litigation of the issue concerning the folding partitions.

2. The threshold amount to trigger the listing of subcontractors and suppliers as required by §11-35-3020, as it relates to Carolina, is $13,575.00 (2 1/2% of Carolina's base bid in this solicitation).

3. Carolina received unsolicited bids from subcontractors and suppliers seeking to perform various portions of the work that are under protest. Carolina also solicited bids from various subcontractors and suppliers that might not otherwise have sought to participate in this upfitting project.

4. The bid of $2,503.70 from Bass Specialties for the folding door and $13,032 for the folding partitions was not received by Carolina until August 18, 1987, after the bid opening.

5. The testimony of Carlisle Smith concerning Carolina's receiving prebid oral quotes from Butler Hardware was not convincing.

6. If not for the award of the contract to Carolina, Bass Specialties would not have broken down its bid into smaller categories.

7. The only other bid received by Carolina covering the folding door is that of Butler Hardware dated September 21, 1987.

8. At the time it prepared its bid, Carolina did not have a bid for the folding door alone.

9. The bid of $10,990.00 from Lonnie Miracle for venetian blinds in the old building was for less than the full amount of

blinds required for that building and it omitted approximately 38% of the total number of irregular blinds required (17 of 44 nonrectangular blinds).

10. The unit cost of material and installation of irregular blinds is substantially higher than for regular rectangular blinds.

11. Prior to bid opening, Carolina did not have a bid which covered the material and labor associated with installing all the venetian blinds in the old building alone.

12. The Panel finds that Mr. Smith was less than candid in the hearing before the CPO concerning the date on which the quote from Bass Specialties was received. (Record, p. 8). It is clear from the evidence submitted to the Panel that Bass was not approached about breaking its price down until after bid date.

13. The Panel finds, and the testimony of Liz Timmons of Bass Specialties confirms, the pressure that Bass Specialties felt to accommodate Carolina when it had reason to believe that Carolina had been, or was about to be, awarded the contract.

14. The Panel finds that this same pressure applied to Lonnie Miracle because he knew that Carolina stood a reasonable chance to be awarded this contract. The pressure Mr. Miracle undoubtedly felt, coupled with his admitted failure to visit the job site, casts serious doubt on his testimony on the cost issue. Consequently, the Panel finds that the computation of the cost of the blinds in the old building provided by Metze is more reasonable and adopts it as its own.

15. The Panel finds that the cost to supply and install the blinds in the old building exceeds the threshold amount of $13,575.

DISCUSSION AND CONCLUSIONS OF LAW

Based on its evaluation of the evidence, the Panel does not accept as convincing the testimony of Carolina that it had all the necessary verbal quotes to know, prior to bid day, whether all subcontractors and suppliers were listed as required by §11-35-3020. Carolina's conduct demonstrates that at every turn it sought to break down bids in order to allow it the option to seek even lower prices after bid day.

By creating a threshold percentage, §11-35-3020 is intended to provide general contractors some flexibility for the less significant portions of the contract. Here, however, Carolina sought to find subcontractors on some of the most significant portions of the contract where other general contractors uniformly listed subcontractors and suppliers. Section 11-35-3020 is the legislature's statement of policy to afford some protection to subcontractors and suppliers who are often in an unequal bargaining position with a general contractor and to ensure that the state receives a quality building.

Despite Mr. Smith's assertion that the benefit of his shopping accrued to the state, the record before the Panel suggests another conclusion. Accepting Mr. Smith's testimony as accurate, he used the following quotes for the items under

protest to arrive at his bid:

1. Blinds	(a) Old Building	Kenny Mfg.	$10,990
	(b) New Building	Decorator Supply	9,072
2. Folding Door		Butler Hardware	3,371
3. Folding Partitions		Bonitz	12,800
4. Flush Doors		Caroland Doors	7,322
5. Panel Doors		R&D Enterprises	9,960
6. Millwork		Brazell's	7,332
			$60,847

Additionally, Metze listed subcontractors and arrived at the following totals:

1. Blinds	(1(a) and (b) above)	Joyce Marie	30,983
2. Doors/ Millwork	(Items 4, 5, & 6 above)	Columbia Lumber	28,760
3. Folding Door & Partitions	(Items 2, 3 above)	Bass Specialties	15,237
			$74,980

Consequently, the base bid of Carolina should be approximately $14,000 less than that of Metze. However, the record reflects that Carolina's base bid was $8,099 more than Metze. (Record p. 34) Clearly, the state has received no benefit from Mr. Smith's attempt, as he claimed, to shop prior to bid day, and the Panel so concludes.

These figures further cast doubt on Mr. Smith's testimony which the Panel, as a finder of fact, has the

discretion and duty to judge. Additionally, Carolina offered no evidence other than the testimony of Mr. Smith to prove that the oral quotes received by Carolina were obtained prior to bid day, July 16, 1987. Not one affidavit from a subcontractor was offered by Carolina to verify that verbal quotes were given prior to bid day.

In reaching a decision on this protest the Panel concludes that it is bound by William C. Logan & Associates v. Leatherman, 290 SC 400, 351 S.C. 2d 146,(1986). The Panel concludes as a matter of law that Carolina "negligently or intentionally failed to list subcontractors in accordance with S.C. code Ann. §11-35-3020(1976, as amended)" id at p. 147. Specifically, as the findings of fact dictate, Carolina failed to list a subcontractor for the blinds in the old building and at the time of the bid Carolina had no bid for the folding door alone, but rather had several bids above the threshold which included the folded door.

In Logan the court stated "[i]t is irrelevant that the bidder may have had plans to gather additional bids in the future in such a manner that, according to the bidder's own in-house estimate, the subcontractor's bids would not have exceeded the threshold amount." Following the reasoning, the Panel expressly concludes that it is irrelevant that Carolina knew, or thought it knew, that the folding door could be obtained elsewhere for under the threshold. The record indicates that Carolina did not in fact have a separate quote

on the folding door. Thus, Carolina had to accept or reject the offer by Bass or McDonald under the facts of this protest. If a general contractor may rely on a portion of a quote that brings that quote below the threshold for listing subcontractors required by §11-35-3020, this Code provision and the policies embodied therein would be meaningless. Logan requires that general contractors must have all the subcontractors quotes in hand, either verbal or oral, that are necessary to establish that the requirements of §11-35-3020 have been met.

Although the protestant normally has the burden of proof on all items of its protest, in this instance, Carolina had the burden to establish that it was in compliance with §11-35-3020, as further defined by Logan. By offering no other evidence that all quotes were in by bid day, the Panel concludes, based on the facts presented, that Carolina failed to establish what was required by Logan.

Having failed to meet the standard set forth in Logan, the Panel concludes as a matter of law that Carolina's bid was nonresponsive because it failed to list a subcontractor for the blinds (old building) and the folding door and partitions, both of which exceed the threshold amount established by §11-35-3020. The other grounds of Metze's protest are denied.

The motion of Carolina to dismiss that portion of Metze's appeal dealing with the folding partitions as untimely is also denied. Carolina waived its right to raise timeliness

as an issue by failing to object to the consideration of the issue below.

Based on the foregoing, the only remaining issue is the appropriate remedy. In Logan, the court determined that a reaward of the contract was too harsh a remedy when the contract had been executed and work had begun. This situation is not present in this protest. Since no contract has been executed, the Panel finds that the appropriate remedy is to reaward the contract for State Project #9064-F12 to Metze as the next lowest responsive and responsible bidder.

IT IS SO ORDERED.

Hugh K. Leatherman,
Chairman
Procurement Review Panel

October 15th, 1987

STATE OF SOUTH CAROLINA	)	BEFORE THE SOUTH CAROLINA
	)	PROCUREMENT REVIEW PANEL
COUNTY OF RICHLAND	)	CASE NO. 1987-9

IN RE:)
)
PROTEST BY M. L. CLAPP CONSTRUCTION)
COMPANY) O R D E R
)

This matter comes before the South Carolina Procurement Review Panel (the "Panel") on the appeal of M. L. Clapp Construction Company ("Clapp") pursuant to S. C. Code Ann. §§11-35-4210 and 11-35-4410 (1976) from the decision of the Chief Procurement Officer for Construction ("CPO") awarding the contract in State Project # P20-9477 to Blankenship Construction ("Blankenship").

INTRODUCTION

On or about August 12, 1987, in accordance with S. C. Code Ann. §11-35-1520 and Reg. 19-445.2040, 2045 and 2050, Clemson Public Service ("Clemson") solicited bids for construction of nine catfish ponds in Hampton County, South Carolina. After the bid opening on August 26, 1987, Clemson issued a Notice of Intent to Award the contract to Clapp. On September 2, 1987, the CPO received a protest from Blankenship contending that it should be awarded the contract because of alleged irregularities in the bidding process. Essentially, Blankenship contended that Clapp's bid was not timely delivered and, therefore, should not have been considered.

The CPO issued his decision on September 21, 1987, determining that Clapp had not proved that its bid was timely

received and directing that the contract be awarded to Blankenship. Clapp timely filed its Request for Review by the Panel on September 30, 1987.

As a result of Clapp's Request for Review, the Panel held a hearing on October 13, 1987. A quorum of the Panel was present. Also present were M. L. Clapp Construction Company represented by Paul Detrick, Blankenship Construction represented by H. Grady Brown, and the Department of General Services, represented by Helen Zeigler. Clemson University was also present but was not represented by counsel.

FINDINGS OF FACT

Based on the evidence presented the Panel finds the facts of this case to be as follows:

Sometime prior to July 1987, Clapp learned that bids were being solicited by Clemson for construction of a catfish demonstration facility in Estill, South Carolina. Clapp submitted a bid by first class mail and in the course of time learned that it was the low bidder. Clapp was not awarded the contract, however, because of funding problems.

A short time later Clapp learned that a new invitation to bid had been issued for the project and Clapp again decided to submit a bid. To that end, Mr. Marshall L. Clapp and his wife worked the weekend prior to the scheduled August 26, 11:00 A.M. bid opening on preparing the bid. Mr. Clapp had a previous conversation with Mr. George L. Hardy, Jr., of Clemson, who was the Project Director, in which Mr. Hardy advised Mr. Clapp that

it was acceptable to mail bids. In reliance on that conversation, Mr. Clapp sent his wife to the post office Monday morning to mail Clapp's bid to the State Engineer's Office. Mrs. Clapp asked and was assured by the post office that regular mail sent from Hampton that day would reach Columbia by 11:00 A.M. August 26, the bid opening date. On Monday evening Clapp advised George Hardy that his bid had been mailed that day.

On the morning of the bid opening, the regular mail for the State Engineer's Office arrived in its normal course and was put in a dumbwaiter to be picked up by the appropriate offices. Normally, the receptionist shared by the State Engineer and the Construction and Planning office would pick up the mail, open and stamp it and then distribute it to the proper parties. On this occasion, however, because of a recent vacancy in the receptionist position, Jolene Martin, an employee of Construction and Planning, picked up the mail from the dumbwaiter between 10:30 and 11:00 A.M. Numerous witnesses testified that it was not unusual for the mail to arrive either before or after 11:00 A.M.

Ms. Martin did not open and stamp the mail but did separate the State Engineer's batch from the Construction and Planning batch. She took the Construction and Planning batch with her and put the State Engineer's batch on Rachel Langdon's desk. Ms. Langdon is the secretary to Sam Harper, an engineer with the State Engineer's office, and is the person designated to receive mail for that office.

When the mail was placed on Ms. Langdon's desk in a position where she could see it, she was busy preparing forms for persons who were in her office waiting on them. As a consequence, rather than sorting and opening the mail, Ms. Langdon laid it to one side. Ms. Langdon does not remember what time the mail was laid on her desk.

Ms. Lynn Verlinden, an accounting technician in the State Engineer's office walked by Ms. Langdon's desk on the way from her desk to a birthday party being given for her down the hall. She remembers seeing the mail sitting on Ms. Langdon's desk at that time. She also remembers glancing at the clock hanging on the wall across from Ms. Langdon's desk and noting the time as two or three minutes after 11:00 A.M.

The bid opening for the catfish project was scheduled to begin in the State Engineer's office at 11:00 A.M. At about 10:40 A.M., George Hardy and Dr. John Collier arrived from Clemson. Mrs. Blankenship of Blankenship Construction was already there, waiting in the conference room with her bid. At a few minutes to 11:00 A.M., Sam Harper came into the conference room, recorded some personal notes relative to the impending bid opening, and left.

According to Mr. Harper, he went into the outer office to check for persons who might be present for the bid opening. According to her he did not check with Rachel Langdon to see whether any bids had come in the mail. Finding no other persons waiting for the bid opening, Mr. Harper returned to the conference room.

The two bids available were then opened and it was revealed that Blankenship was the low bidder at $28,750.00. Mr. Harper asked Mrs. Blankenship if she felt she had made any errors in her bid. She said no. Dr. Collier advised her that a Notice of Intent to Award and Bid Tabulation would be sent out in a few days.

Within minutes after Mrs. Blankenship left, Rachel Langdon discovered on her desk in the morning mail the bid from Clapp. She looked at the clock and noted that it was 11:30 A.M. Ms. Langdon immediately took the bid to Sam Harper. Because the State Engineer, Jay Flanagan, was not in, Mr. Harper instructed Mr. Hardy and Dr. Collier to take Clapp's sealed bid back to Clemson and not to open it until he had a chance to speak with Mr. Flanagan.

That night Mr. Clapp called Mr. Hardy to inquire about the results of the bid opening. He was advised of the late discovery of the bid and was told that Mr. Flanagan would decide in the morning whether to open the bid.

After discussing the situation with Sam Harper, Mr. Flanagan decided that Clapp's bid should be opened pursuant to Reg. 19-445.2070 (H). That regulation provides:

> Subsection H. - Exceptions to Rejection Procedures. Any bid received after the procurement officer of the governmental body or his designee has declared that the time set for bid opening has arrived, shall be rejected unless a bid was in the possession of the designated purchasing office and had been misplaced by state employees in that office. In this event, the Chief Procurement Officer, or the procurement officer of the governmental body, shall annotate

> the bid tabulation and consider the misplaced bid along with the other previously received bids. (Emphasis added).

When Clapp's bid was opened, it was discovered that Clapp was the low bidder at $24,725.00.

Mr. Clapp and Mrs. Blankenship were advised of the bid opening and shortly thereafter, they along with Malphrus Construction received the Notice of Intent to Award and Bid Tabulation indicating that Clapp would be awarded the contract.

Blankenship protested the award and a hearing was held before the CPO, Mr. Flanagan. Neither Jolene Martin nor Lynn Verlinden testified at that hearing, however, and the CPO decided that it could not be determined when Clapp's bid arrived. He therefore awarded the contract to Blankenship.

DISCUSSION AND CONCLUSIONS OF LAW

This case raises three issues for consideration by the Panel. First, Blankenship contends that it cannot be determined with certainty that Clapp's bid was delivered at the State Engineer's office prior to August 26, 1987 at 11:00 A.M. Blankenship argues that after all the evidence is considered there still remains some doubt as to when Clapp's bid was received.

The standard of proof in a civil case, including administrative hearings, is a preponderance or greater weight of the evidence. A "preponderance of the evidence" is simply that evidence which is convincing as to its truth. Frazier v. Frazier, 228 S. C. 149, 89 S.E.2d 225 (1955). Any fact in issue may be proved with either direct or circumstantial evidence. St. Paul

Fire and Marine Ins. Co. v. American Ins. Co., 251 S. C. 56, 159 S.E.2d 921 (1968). Where circumstantial evidence is relied upon, the facts proved need not be such to exclude every other conclusion. They need only be sufficient to reasonably warrant the inference sought. Floyd v. Town of Lake City, 231 S. C. 516, 99 S.E.2d 181 (1957).

All Clapp must show in this case is that it is more probable than not that its bid was timely delivered. It is not necessary that Clapp prove its case beyond all doubt.

While it cannot be determined with absolute certainty, the Panel is convinced that it is more likely than not that Clapp's bid was received by 11:00 A.M. on August 26. Jolene Martin's testimony that she normally got the mail between 10:30 and 11:00 coupled with Lynn Verlinden's recollection that she saw the mail on Rachel Langdon's desk at 11:02 or 11:03 make it probable that Clapp's bid was in the office of the State Engineer prior to the bid opening.

The second issue raised by both Blankenship and the Division of General Services is that, under the bid documents, Clapp assumed responsibility of insuring that its bid was timely delivered. Section 4.3.3 provides that, "The bidder shall assume full responsibility for timely delivery at the location designated for receipt of bids." Blankenship and General Services argue that Clapp failed to meet its responsibility because it did not inquire about state mail service in enough detail, it used regular mail rather than certified or overnight mail or hand delivery, and it

did not follow up on the whereabouts of its bid after it was mailed but prior to bid opening.

The Panel recognizes that it is highly unusual for a contractor to entrust its bid on a construction project to regular mail. However, the Instructions to Bidders clearly contemplate and approve of regular mail as a means of bid delivery. See Section 4.3.1. In addition, Mr. Clapp had previous favorable experience in mailing bids and had cleared with Mr. Hardy the appropriateness of mailing his bid in this case. Recognizing that Mr. Clapp did not exert every effort he might have, nevertheless, the Panel concludes that Clapp's bid was in fact timely delivered and that Clapp met its responsibility under section 4.3.3 of the Instructions to Bidders.

Finally, Blankenship argues that, even assuming Clapp's bid was on Rachel Langdon's desk by 11:00 A.M., there was no basis for opening the bid because it was not "misplaced" within the meaning of Reg. 19-445.2070 (H) quoted above. Giving "misplaced" its ordinary meaning, as is urged by Blankenship, the Panel concludes that Clapp's bid was indeed misplaced under the facts of this case.

Ms. Langdon testified that when the mail was placed on her desk she was too busy to attend to it and pushed it out of her way to one side of her desk. In essence, she forget about it until more pressing matters were taken care of. In addition, several witnesses testified that, although it would have been normal or usual for Sam Harper to check with Ms. Langdon to see

if she had any bids, he did not in this case, according to Ms. Langdon.

If Ms. Langdon had sorted the mail rather than laying it aside or if Mr. Harper had checked with Ms. Langdon prior to bid opening, the bid would have been discovered. Under the circumstances, the bid was in the wrong place and was therefore "misplaced" by employees of the State Engineer's office. The Panel concludes that Reg. 19-445.2070 (H) applies in this case.

CONCLUSION

For the reasons stated above, the Panel finds that the CPO was incorrect in deciding that Clapp's bid was not timely delivered. Therefore, the decision of the CPO is reversed and it is ordered that the contract in State Project No. P20-9477 be awarded to M. L. Clapp Construction Company.

IT IS SO ORDERED.

Hugh K. Leatherman, Sr.
Chairman
Procurement Review Panel

October 15th, 1987

STATE OF SOUTH CAROLINA	)	BEFORE THE SOUTH CAROLINA
	)	PROCUREMENT REVIEW PANEL
COUNTY OF RICHLAND	)	CASE NO. 1987-11

IN RE:	)	
	)	
PROTEST BY LOWCOUNTRY REGIONAL TRANSPORTATION AUTHORITY	)	O R D E R
	)	

It appearing that the parties hereto have reached agreement and that the Protestant Lowcountry Regional Transportation Authority has withdrawn its protest, it is hereby ordered that the above matter is dismissed.

South Carolina Procurement Review Panel

Hugh K. Leatherman
Chairman

Columbia, South Carolina
11-6-87, 1987

STATE OF SOUTH CAROLINA	)	BEFORE THE SOUTH CAROLINA
	)	PROCUREMENT REVIEW PANEL
COUNTY OF RICHLAND	)	CASE NO. 1988-1

IN RE:	)	
	)	
PROTEST BY XEROX CORPORATION	)	O R D E R

The protestant Xerox Corporation having withdrawn its protest, it is hereby

ORDERED that the above matter be dismissed with prejudice.

SOUTH CAROLINA PROCUREMENT REVIEW PANEL

Hugh K. Leatherman, Sr.
Chairman

Columbia, South Carolina
2-25-88, 1988

STATE OF SOUTH CAROLINA	)	BEFORE THE SOUTH CAROLINA
	)	PROCUREMENT REVIEW PANEL
COUNTY OF RICHLAND	)	CASE NO. 1988-2

IN RE:	)	
	)	
PROTEST OF WAREHOUSE DISTRIBUTING COMPANY	)	O R D E R
	)	

This case came before the South Carolina Procurement Review Panel ("Panel") for hearing on March 24, 1988, pursuant to S. C. Code Ann. §§ 11-35-4210 and -4410(1976) on the protest of Warehouse Distributing Company ("Warehouse"). Present at the hearing were the Protestant Warehouse represented by Walter Bailey, Esquire, and the Division of General Services represented by Helen Zeigler, Esquire.

After hearing the testimony of the various witnesses and considering all the evidence, the Panel issues the following findings of facts and conclusions of law.

FINDINGS OF FACTS

On or about November 12, 1987, the Division of General Services issued a Bid Invitation for the provision of school bus repair/maintenance parts for the Department of Education for the period January 1, 1988 through December 31, 1989. The section of the bid instructions at issue in this case provides as follows:

CATALOGS-PRICE LISTS-DISCOUNT SHEET-NET PRICES:

> Price list(s) must be published and distributed to all parts consumers. Bids are to be submitted on a jobber or distributor list-plus or minus discount-or net basis, and all items included in the manufacturer's catalog are to be marked to indicate applicable discounts. Bidders should show which price category is to be used and applicable discount, if any, to price used.
>
> NET PRICE MUST BE SHOWN ON ALL SPECIFIED PARTS SHOWN HEREIN

AFTER APPLICABLE DISCOUNTS HAVE BEEN TAKEN AND MANUFACTURER'S INTERCHANGEABLE NUMBERS MUST BE SHOWN IN SPACES PROVIDED. Discount must be taken from manufacturer's price sheet. No other price sheets will be accepted. Net prices are to be only for the purpose of determining low bids and all other items included in manufacturer's price list must be applicable to bidder's discount.

Award will be based on the net price bidder indicates on bid form and will be made separately for each lot.

(Bid Invitation, Page 14.)

Only two bidders responded to the Bid Invitation for the lots at issue here - Dixie Tool Distributors ("Dixie") and Warehouse. When the bids were publicly opened on December 7, 1987, Dixie had the lowest net price bid. Mr. James Harmon, President of Warehouse, attended the bid opening and made notes of the amounts bid by the other vendors. Although the only amounts announced at the opening were the net price figures, Mr. Harmon testified that, based on his familiarity with the product line, he suspected that the apparent low bidder, Dixie, had used multiple discounts on a single price sheet.

On December 17, 1987, General Services issued an Intent to Award the contract to Dixie. The discounts quoted by Dixie were listed on the Intent to Award.

On December 22, Mr. Horace Sharpe, who is employed by General Services as a Supervisor in Commodity Services, talked with Mr. Harmon on the telephone. Mr. Sharpe testified that he and Mr. Harmon discussed the award of the contract to Dixie and that Mr. Harmon indicated that he felt that Dixie's use of multiple discounts, rather than a single discount on one price sheet violated the section of the bid instructions

quoted above. Mr. Harmon testified that, although he does not remember the exact date, he did talk with Mr. Sharpe about Dixie's bid. Mr. Sharpe's telephone log indicates that he talked with Mr. Harmon on December 22 as he recalled. (Defendant's Ex. #2).

Mr. Harmon testified that he did not receive the Intent to Award until December 28, 1987, at which time he knew for certain that Dixie had used multiple discounts. According to Mr. Harmon, he wrote and mailed Warehouse's letter of protest on December 29, 1987(Plaintiff's Ex. #1E). The letter is directed to "Mr. Charlie Webb, State of South Carolina, Division of General Services, Material Management, Columbia, SC." No street address, box number or zip code appears on the letter. Mr. Harmon testified that the address used on the letter was copied from the address printed by General Services on the Intent to Award. General Services received Warehouse's protest letter on January 5, 1988.

Mr. Charles W. Webb, a buyer for General Services, testified that he had a telephone conversation with Mr. Harmon on December 28 in which he advised Mr. Harmon that, if Warehouse wished to protest, it had to do so in writing to the Chief Procurement Officer. Mr. Webb stated that he never advised Mr. Harmon to direct the letter to him.

Mr. Sharpe testified that he spoke with Mr. Harmon on December 29 and advised him that General Services had decided that the specifications were ambiguous and could be interpreted to allow quotations of single or multiple discounts. Mr. Sharpe

stated that Mr. Harmon definitely did not agree with General Services' interpretation of the specifications.

After General Services received the letter of protest, Webb, Sharpe and their supervisor Virgil Carlson, State Procurement Officer, made the decision that, since the specifications were ambiguous, the contract should be rebid with revised specifications which allowed multiple discounts. Mr. Sharpe testified that Warehouse's Protest was never forwarded to the Chief Procurement Officer for hearing because he felt that the decision to rebid obviated the need for a hearing.

On or around January 19, Mr. Sharpe called Mr. Harmon's attorneys and advised them of the decision to rebid. Mr. Harmon's attorney did not object and Mr. Sharpe believed that the matter was resolved. Mr. Sharpe admits that Mr. Harmon never gave him the impression that he agreed with General Services' decision to rebid. Mr. Harmon testified that when he was advised of the rebid by his lawyers, he stated his dissatisfaction with the decision but was told General Services could do what it wanted and there was no reason to protest. Mr. Harmon stated he began searching for new counsel at that point.

A new Bid Invitation was issued on January 19, 1988. Warehouse participated in the rebid and this time it bid multiple rather than single discounts. In addition, according to Mr. Harmon, he lowered certain previously quoted prices. As a result, Warehouse, rather than Dixie, was the low bidder. Mr. Harmon estimated that Warehouse would lose approximately $18,000 because

of the difference in its first and second bids. Mr. Harmon admitted that this figure was speculative.

On February 9, the bids were opened. On February 10, Mr. Harmon talked with Mr. Sharpe and inquired when Warehouse would get a hearing on its protest. Mr. Sharpe responded to Mr. Harmon in writing on March 1, 1988, and advised Mr. Harmon that Warehouse would receive no hearing. On March 9th Warehouse filed its protest with the Panel.

DECISION

A. Timeliness

General Services contends that the December 29 protest letter received by it on January 5 was not timely and, therefore, no jurisdiction exists for the Panel to hear Warehouse's appeal. Section 11-35-4210 provides:

> Any actual or prospective bidder, offeror, contractor, or subcontractor who is aggrieved in connection with the solicitation or award of a contract may protest to the appropriate chief procurement officer. The protest, setting forth the grievance, shall be submitted in writing within ten days after such aggrieved persons know or should have known of the facts giving rise thereto, but in no circumstance after thirty days of notification of award of contract.

The statute requires that the protest be "submitted" within ten days of a person's knowing sufficient facts to give rise to a protest.

General Services urges that this section be construed to require that the Chief Procurement Officer actually receive a written protest within the time limits imposed. Warehouse argues that all that is necessary is mailing within the time.

The South Carolina Supreme Court has held in numerous cases that, when notice is required to be given and mailing is not excluded as a method of delivery, service is complete when deposited in the post office, properly addressed to the person to be served, with postage paid. See, e. g., Town of Honea Path v. Wright, 9 S. E. 2d 924(1940)(notice of appeal from municipal court); Craig v. United States Health & Accident Ins. Co., 61 S. E. 423(1908)(notice of claim); Walters v. Laurens Cotton Mills, 31 S. E. 1 (1898)(notice of appeal); Sullivan v. Speights, 12 S. C. 562(1879)(exceptions to circuit court order).

The panel sees no reason to apply a stricter construction to § 11-35-4210 than is required by the plain language of the statute. The dictionary definition of "submit" is "to commit (something) to the consideration or judgment of another." (American Heritage Dictionary). The Panel finds that a protest sent by mail is "submitted" within the meaning of the statute when it is deposited with the post office, properly addressed, with postage paid.

In light of this construction of the statute, Warehouse's protest, mailed on December 29, is timely even accepting General Services' assertion that Mr. Harmon knew of facts sufficient to file a protest by December 22.

General Services also contends that Warehouse's appeal to this Panel is untimely because rebid documents were issued on January 19 but Warehouse's appeal was not received until March 9. Section 11-35-4210 requires a person aggrieved by a written

decision of the chief procurement officer to appeal that decision within ten days of the decision. The Panel does not consider the January 19th rebid documents to be a "decision" under § 11-35-4210. The first written decision rendered by General Services is the March 1, 1988 letter from Mr. Sharpe. Warehouse's appeal to this Panel was filed nine days after this decision and is therefore timely.

The Panel is not persuaded by General Services argument that the initial protest letter is not valid because it was not addressed to the Chief Procurement Officer. Warehouse directed its letter(which clearly indicated that it was a protest) to the procurement officer listed on the Bid Invitation. That officer, Mr. Webb, testified that he was uncertain which one person in his office qualified as the CPO. The Panel finds that, under the circumstances of this case, Warehouse's letter was sufficient to satisfy the requirement that it be directed to the Chief Procurement Officer.

B. Waiver

General Services also argues that, even if the initial protest were timely, Warehouse waived its right to a hearing and decision on the protest because it participated in the rebid without objection. The Panel recognizes General Services' correct statement of the law in South Carolina that one may by his conduct waive rights he may otherwise have; however, the Panel does not find that Warehouse's conduct in this case amounted to such a waiver.

Mr. Horace Sharpe candidly testified that Mr. Harmon never

gave him the impression that Warehouse agreed with General Services' interpretation of the contract specification. Mr. Sharpe did state that, after talking with Warehouse's attorneys he thought there was no objection to the rebid.

Mr. Harmon explained that he learned of the decision to rebid on or about the same day as he received the documents. He also testified that when he learned of the rebid he went to his attorneys and was advised by them that he had no grounds to protest. According to Mr. Harmon, he did not accept this advice, but instead discharged his attorney and began looking for other counsel. In the meantime, in order not to be left out, Warehouse participated in the rebid and won the contract. Before accepting the contract, Mr. Harmon again attempted to get General Services to hold a hearing on his original protest.

Considering this conduct as a whole and considering that Mr. Harmon, with his new counsel, has vigorously pursued Warehouse's rights since the rebid, the Panel cannot say that Warehouse acted in a manner inconsistent with its rights to a decision on its protest or in such a way as to waive them.

C. Propriety of Rebid

The final questions presented to the Panel are whether the original specification relating to discounts was ambiguous and whether rebid of the contract was warranted. The Panel finds the answer to both these questions is "yes".

There was much conflicting testimony concerning the ambiguity of the specifications, the language of which has

apparently been the same for the last several years. Mr. Harmon, who has successfully bid on Department of Education bus parts contracts since 1963, testified that multiple discounts have never been allowed under the specifications in question. Mr. Harmon's position was supported by the Director and Assistant Director of the Department of Education's Office of Transportation in a letter dated February 8, 1988, which stated, "For many years, the Department's position has been to limit the discounts on any price sheet to one figure." (Plaintiff's exhibit #1G). Warehouse further argues that use of the word "discount" in the singular in the specs precludes a vendor from bidding multiple discounts.

On the other hand, Mr. Horace Sharpe, testified that a number of vendors, including Dixie Tool Distributing in this case, had bid multiple discounts on a single price sheet under the specs in question. As part of its case, General Services introduced into evidence several bids of winning vendors who bid multiple discounts (Defendant's Exhibit #3). Mr. Charles Webb testified that the Department of Education's Purchasing Office worked with General Services on the Bid Invitation in this case and never expressed an objection to multiple discounts. Indeed, Mr. Tracy Bedenbaugh, who is employed by the Purchasing Office, testified that he was not aware of any policy against multiple discounts and that, as far as his office was concerned, multiple discounts could be administered just as easily as single discounts and would result in savings to the State.

A word or phrase is ambiguous when it is of uncertain meaning and may be fairly understood in more than one way. See Carolina Ceramics, Inc. v. Carolina Pipeline Company, 251 S. C. 151, 161 S. E. 2d 179 (1968). The Panel finds that the specification at issue here is confusing and is fairly susceptible to more than one interpretation and that ambiguity warranted rebidding the contract.

The Procurement Code and regulations are clear that General Services may cancel a bid invitation prior to award provided it determines in writing with reasons set forth that the specs are ambiguous. S. C. Code Ann. § 11-35-1710(1976) and Reg. 19-445.2065. Mr. Sharpe testified that he made a memorandum to the file in this case in compliance with the Code. While this memorandum to the file may have been sufficient to satisfy the requirements of § 11-35-1710 and Reg. 19-445.2065(B), it was not sufficient to satisfy the requirements of § 11-35-4210(3),(4) that Warehouse's protest be forwarded to the Chief Procurement Officer and that a written decision be rendered and mailed or otherwise furnished to the protestant.

However well-intentioned the actions of General Services may have been in attempting to resolve this case, and however correct its decision to rebid, the fact remains that Warehouse was not afforded its rights in a timely manner. For this reason the Panel exercises its authority pursuant to § 11-35-4210(7) and awards Warehouse its costs and attorneys' fees

incurred in pursuing its rights in the action before the Panel and below. Warehouse is directed to submit to the Panel for approval within 30 days of receipt of this Order proof of its costs and attorneys' fees (including the fees of its original attorneys Williams & Williams). The Panel retains jurisdiction to consider these costs and fees and to order any additional reimbursement it finds to be in the interests of justice.

WHEREFORE, it is ordered that the protest of Warehouse be dismissed, that Warehouse be awarded the contract as rebid and that the Division of General Services and department of Education pay to Warehouse such costs and attorneys' fees as are approved by the Panel.

IT IS SO ORDERED

Hugh K. Leatherman, Sr.
Chairman
South Carolina Procurement Review Panel

Columbia, South Carolina

3-30-88, 1988

STATE OF SOUTH CAROLINA)	BEFORE THE SOUTH CAROLINA
)	PROCUREMENT REVIEW PANEL
COUNTY OF RICHLAND)	CASE NO. 1988-2
IN THE MATTER OF PROTEST OF)	
WAREHOUSE DISTRIBUTING COMPANY)	ORDER
OF AWARD OF CONTRACT #6-062-1108200-)	
12/7/87)	

On March 30, 1988, the South Carolina Procurement Review Panel ("Panel") issued its Order in the above case awarding the Protestant Warehouse Distributing Company ("Warehouse") such costs and attorneys' fees as the Panel determined appropriate. Warehouse has submitted its request for costs and fees supported by the documents attached hereto as Exhibit 1. The Respondent Division of General Services has submitted its comments on Warehouse's request and such comments are attached hereto as Exhibit 2. Considering the information presented, the Panel finds as follows.

The Division of General Services is ordered to pay to Walter M. Bailey, Jr., counsel for Warehouse, the sum of $980.20, which represents $23.95 in expenses and $956.25 in fees for 12.75 hours work at $75.00 per hour. The Panel finds that $75.00, which is the highest rate approved by the Attorney General of South Carolina for outside work performed by attorneys in a specialized area, is a reasonable rate in this case.

The Division of General Services is further ordered to pay to Warehouse the sum of $100.32, which represents $40.32 for Mr. Harmon's travel to Columbia to the hearing (192 miles at $.21 per mile) and $60.00 for Warehouse's office and telephone expenses.

The Panel finds that $.21 per mile, which is the mileage allowed state employees, is reasonable in this case. The rest of Warehouse's listed expenses are disallowed.

Finally, the Panel declines to award Williams & Williams its charges in this case because of the impossibility of determining from the statement submitted what services were performed.

General Services is ordered to pay the sums as directed above within sixty (60) days from the date of this Order.

IT IS SO ORDERED.

Hugh K. Leatherman, Sr.
Chairman

4-27-88, 1988
Columbia, South Carolina

STATE OF SOUTH CAROLINA	)	BEFORE THE SOUTH CAROLINA
	)	PROCUREMENT REVIEW PANEL
COUNTY OF RICHLAND	)	CASE NO. 1988-3

IN RE:	)	
	)	
PROTEST OF ZUPAN AND SMITH SAND & CONCRETE COMPANY, INC.	)	O R D E R
	)	

This case came before the South Carolina Procurement Review Panel ("Panel") for hearing on April 7, 1988, pursuant to S. C. Code Ann. §§ 11-35-4210 and -4410(1976) on the protest of Zupan & Smith Sand and Concrete Co., Inc ("Zupan"). Present at the hearing were Mr. William Twitty, Jr., representing Zupan, Mr. Len Smith, representing Metromont, Mr. Jimmy Boleman, representing Clemson University, and Ms. Helen Zeigler, Esquire, representing the Division of General Services. Zupan protests the intent to award to Metromont Materials Corp. ("Metromont") a contract to supply all Clemson University's Ready Mix Concrete needs on the grounds that the South Carolina products preference is not applicable to the contract in question.

FINDINGS OF FACT

The facts are undisputed and are found by the Panel to be as follows:

1. Clemson University issued a solicitation for bids to provide all its needs for one year for three classes of Ready Mix concrete - 2500 PSI, 3000 PSI, and 3500 PSI.

2. Approximately ten vendors participated in the bidding process. All were from South Carolina.

3. When the bids were opened, Zupan was revealed to be the low bidder on the face of its bid.

4. Zupan did not complete an affidavit to claim the South Carolina products preference, even though it was included in the bid package, because Zupan did not believe that the preference applied to the contract in question.

5. The second low bidder, Metromont, did file the affidavit to claim the South Carolina product preference. Metromont did not list the lots on which it was claiming preference as is required by the affidavit.

6. Clemson University found the South Carolina products preference applicable and declared its intent to award the contract to Metromont, which became the low bidder after the preference was applied.

7. Clemson will use the concrete solicited for a variety of purposes including maintenance and repair of roads, patios and sidewalks, etc., and the making of manhole covers and crane weights. Clemson admitted that a large majority of the concrete would be used in the maintenance and repair area.

DISCUSSION AND CONCLUSIONS OF LAW

Zupan claims that the affidavit for South Carolina product preference by its terms does not apply to the contract. The terms of the affidavit are taken from Reg. 19-446.1000, which provides:

> Subsection D. Exceptions. This Regulation shall not apply: (1) to any procurement of permanent improvements for real

> estate, or, (2) to any prime contractor or subcontractor providing materials or services relating to permanent improvements on real estate, or, (3) to any solicitation, bid, offer, or procurement when the price of a single unit of the end-product is more than $10,000, whether or not more than one unit is bid or offered . . . .

Zupan argues that the procurement of concrete is a "procurement of permanent improvements for real estate" or, at the very least, is a procurement of "materials or services relating to permanent improvements on real estate." Zupan also argues that the price of a single unit of the end-product in this case could exceed $10,000, a unit being an entire allotment of a certain class of concrete for a certain end-product.

A "permanent improvement" is defined as "something, which is done to or put on land, and which the occupant cannot remove or carry away with him, either because it has become physically impossible, or because, in contemplation of law, it has been annexed to the soil and is therefore to be considered part of the freehold." Durham v. Davis, 101 S. E. 2d 278. An "improvement" generally includes "buildings, but may also include any permanent structure or other development, such as streets, sidewalks, sewers, utilities, etc." Black's Law Dictionary 682 (5th ed. 1979). Only the use of concrete as a crane weight in this case could possibly not relate to permanent improvements on real estate. The Panel takes notice that generally crane weights are fashioned from extra concrete rather than from concrete specifically ordered for that purpose. The testimony of Mr. Jimmy Boleman, Director of Purchasing for Clemson, indicated that use as a crane weight by Clemson would indeed be rare and,

The March 10, 1988, Order of the Chief Procurement Officer is hereby reversed and the contract is awarded to Zupan & Smith Sand and Concrete Company, Inc.

IT IS SO ORDERED.

Hugh K. Leatherman, Sr.
Chairman
South Carolina Procurement Review Panel

Columbia, South Carolina

4-13, 1988

STATE OF SOUTH CAROLINA	)	BEFORE THE SOUTH CAROLINA
	)	PROCUREMENT REVIEW PANEL
COUNTY OF RICHLAND	)	CASE NO. 1988-3

IN RE:)
)
PROTEST OF ZUPAN AND SMITH SAND & CONCRETE COMPANY, INC.) O R D E R
)

On April 13, 1988 the South Carolina Procurement Review Panel (the "Panel") issued its order in this matter awarding Clemson University contract number 9405 to the protestant Zupan & Smith Sand & Concrete Company. On May 12, 1988 Metromont Materials Corp. ("Metromont") filed in the Circuit Court in Greenville County a petition for review of that order. On May 16, 1988 the Panel received Metromont's Motion for Rehearing on the facts and questions of law in this case. Metromont states a number of supporting grounds for its motion.

The Procurement Code, S. C. Code Ann. §§ 11-35-10 et sec. (1976) is silent on whether an unsuccessful litigant can obtain a rehearing on a matter decided by the Panel. The Administrative Procedures Act ("APA") recognizes that rehearing by an agency may be a part of the administrative review process when it provides, "Proceedings for review are instituted by filing a petition in the circuit court within thirty days after the final decision of the agency, or, if a rehearing is requested, within thirty days after the decision thereon." § 1-23-380 (b). It is unsettled in South Carolina whether, in the absence of express statutory authority, an administrative agency has the inherent or implied power to rehear or otherwise reconsider a final decision made by it. Authorities from other jurisdictions are split on the

question. See 2 Am. Jur. 2d 522.

Generally, an agency has those powers which are expressly conferred plus those which are necessary by reasonable implication and those which are merely incidental to powers expressly granted. Section 11-35-4410 gives the Panel broad powers to perform its function as a reviewing body of state purchasing decisions, including the power to interview all persons, review all decisions, record all determinations and establish its own rules and procedures for the conduct of its business, including the holding of hearings. The Panel finds that it is within its inherent power to hold rehearings and otherwise reconsider decisions made by it.

In the present case the Panel is disposed to grant Metromont's motion to hear arguments on the legal issues raised which were not fully developed at the initial hearing. At that hearing neither the Protestant nor Metromont were represented by attorneys.

Notwithstanding the above, the power to grant a rehearing exists only if the agency still retains jurisdiction over the case. See, e. g. Epps v. Bryant, 65 S.E.2d 112 (1951) (filing of notice of appeal stays any further action in the court below and an order modifying the order on appeal was void). See, also, Lebovitz v. Mudd, 289 S.C. 476, 347 S.E.2d 94 (1986); Johnson v. Brandon, 69 S.E.2d 594 (1952).

While the Panel is inclined to grant Metromont's Motion for Rehearing for the purpose of hearing arguments on the legal

issues raised therein, it is unable to because the filing of the complaint for review in the Circuit Court deprives the Panel of jurisdiction to entertain the motion. Should the Circuit Court relinquish jurisdiction to the Panel and provided that the question is not moot, Metromont's Motion for Rehearing on the questions of law arising in this matter is granted.

IT IS SO ORDERED.

Hugh K. Leatherman, Sr.
Chairman

May 19, , 1988
Columbia, South Carolina

STATE OF SOUTH CAROLINA)
)
COUNTY OF GREENVILLE)

IN THE COURT OF COMMON PLEAS

Metromont Materials Corp.,

Plaintiff,

vs.

South Carolina Procurement Review Panel,

Defendant.

C.A. No. 88-CP-23-1990

ORDER

This matter is before the Court upon motion of plaintiff's counsel, seeking a stay of proceedings pending final administrative review by the defendant South Carolina Procurement Review Panel (Review Panel) on plaintiff's Motion for Rehearing filed with the defendant on May 11, 1988. By Order dated May 19, 1988, a copy of which has been filed in this action, the Procurement Review Panel has granted plaintiff's Motion for Rehearing, subject to an Order of this Court staying proceedings in the within action and conferring jurisdiction upon the Procurement Review Panel to proceed with administrative review.

Now, therefore, upon the motion of Koger M. Bradford of Butler, Means, Evins & Browne, Attorneys for plaintiff, and with the consent of Faye A. Flowers, Attorney for the Review Panel, and for good cause shown, it is

ORDERED, that further proceedings in the within action are stayed pending final decision by the defendant Procurement Review Panel In The Matter Of Protest Of Zupan & Smith Sand and Concrete Company, Inc., Quotation No. 9405, Case No. 1988-3. The

defendant need not answer plaintiff's Complaint until thirty (30) days following the service of amended pleadings by plaintiff, should it seek to appeal the final decision of the Procurement Review Panel.

IT IS SO ORDERED.

#2

s/ William B. Traylor, Jr.
Judge, 13th Judicial Circuit

Dated: June 7, 1988

I So Move:

Koger M. Bradford
Attorney for Metromont Materials Corp.

I Consent:

Faye A. Flowers
Attorney for South Carolina Procurement Review Panel

A Certified Copy
Clerk of Court C.P. & G.S.
Ex-Officio Clerk County Court
Greenville County, S.C.
Dated JUN 7 1988

STATE OF SOUTH CAROLINA	)	BEFORE THE SOUTH CAROLINA
	)	PROCUREMENT REVIEW PANEL
COUNTY OF RICHLAND	)	CASE NO. 1988-3

IN RE:	)	
	)	
PROTEST OF ZUPAN AND SMITH SAND & CONCRETE COMPANY, INC.	)	O R D E R
	)	

This matter came before the South Carolina Procurement Review Panel ("Panel") for rehearing on June 15, 1988. The Panel originally heard this case on April 7, 1988 and issued its Order in favor of the Protestant Zupan and Smith Concrete Company, Inc. Metromont Materials Corp. appealed the April 13 Order to the Circuit Court and concurrently petitioned the Panel for a rehearing. The Panel granted the rehearing in its May 19, 1988 order. On June 7, 1988 the Circuit Court relinquished jurisdiction over the case for the purpose of permitting the Panel to rehear arguments on the legal issues involved.

Present at the rehearing were Metromont, represented by Stanley J. Case, Esq., Division of General Services represented by Helen Zeigler, Esq., Clemson University, represented by Ben Anderson, Esq., and Mr. William C. Twitty, Jr., for Zupan and Smith which was not represented by counsel.

The facts in this case are as set forth in the Panel's April 13 Order. At issue is the applicability of the South Carolina products preference to a procurement of Ready-Mix concrete by Clemson University to meet all its general needs for 1988. In the initial hearing Zupan argued, and the Panel found, that the preference stated in Reg. 19-446.1000 did not apply to contractors supplying materials related to permanent improvements

on real estate and that the procurement of concrete in question was related to permanent improvements on real estate. Metromont in its argument before the Panel and its motion for rehearing challenges the Panel's interpretation of Reg. 19-446.1000 and raises several issues which are addressed below.

Metromont's primary argument is that the scheme set up by the Procurement Code contemplates that the Materials Management Office will handle the procurement of general products (as in this case) while the State Engineer is responsible for the procurement of goods and services for specific projects involving permanent improvements to real estate. According to Metromont, the intent of the product preference exception is to exempt procurements for a specific project handled by the State Engineer but not procurements of general items by Materials Management.

In support of its argument, Metromont cites S. C. Code Ann. §1-11-35 (1976), which provides:

> The State Budget and Control Board by regulation shall develop and implement a policy whereby this State and its agencies...in procuring necessary products to perform their assigned duties and functions must obtain products made, manufactured, or grown in South Carolina, if available....

Metromont contends that this enabling statute expresses a broad intent to prefer all South Carolina products generally and that only specific projects for permanent improvements should be exempt. In other words, Metromont advocates a very narrow reading of the exemption of "any prime contractor or subcontractor providing materials or services relating to permanent improvements on real estate" to include only those

contractors working on specific state construction projects.

The Panel finds that the plain language of the exemption does not permit acceptance Metromont's argument.

There is nothing in the preference regulation to indicate that only construction projects handled by the State Engineer are not subject to the product preference. Either the Legislature in § 1-11-35 or the Budget and Control Board in Reg. 19-446.1000 could have exempted "state construction projects or contracts" or "contracts awarded pursuant to § 11-35-3020", which sets forth the procedure for bidding and awarding state construction contracts. Instead, the Budget and Control Board chose to exempt any prime contractor or subcontractor providing materials or services so long as the goods or services are related to permanent improvements on real estate.

Metromont also renews its argument that concrete is not a permanent improvement and cites a tax regulation and a portion of the Uniform Commercial Code as support. First, the laws cited by Metromont are not persuasive because they involve completely different statutory schemes than the Procurement Code. Second, Metromont misses the gravamen of the Panel's original decision. The question is not whether concrete is or is not a permanent improvement; the question is whether concrete as used by Clemson under this contract is related to permanent improvements. "Related" in its ordinary sense means "connected with" or "associated with."

Mr. Jimmy Boleman, Clemson's Director of Purchasing,

testified in the initial hearing that Clemson intended to use the concrete to repair roads and sidewalks, to make new sidewalks, to make manhole covers and to pour crane weights. Only the use as a crane weight is not connected or associated with permanent improvements. Mr. Boleman candidly admitted that he did not know whether Clemson had ever used concrete to make a crane weight and that such use would be incidental. (Transcript of Record, pg. 49).

The Panel stands by its initial finding that the intended uses of the concrete in question are related to permanent improvements on real estate. Under the plain words of the regulation, the South Carolina products preference does not apply in this case and Zupan and Smith, as low bidder, is entitled to the contract.

The remaining arguments of Metromont stated in its Motion for Rehearing are unpersuasive.

The April 13, 1988 Order of the Panel, including the relief granted therein, is hereby reaffirmed.

IT IS SO ORDERED.

Hugh K. Leatherman, Sr.
Chairman

June 22, 1988, 1988
Columbia, South Carolina

STATE OF SOUTH CAROLINA)	BEFORE THE SOUTH CAROLINA
)	PROCUREMENT REVIEW PANEL
COUNTY OF RICHLAND)	CASE NO. 1988-4
IN THE MATTER OF PROTEST OF)	
COMPUTERLAND OF COLUMBIA, INC.)	ORDER
CONTRACT NUMBER 1-205-00249-)	
02/09/88 FOR HEWLETT-PACKARD)	
LASER PRINTERS)	

This case came before the South Carolina Procurement Review Panel ("Panel") for hearing on April 21, 1988, pursuant to S. C. Code Ann. §§ 11-35-4210 and -4410 (1976). The Protestant Computerland of Columbia, Inc. (" Computerland") states a number of grounds on which it claims that state contract number 1-205-00249-02/09/88 for the provision of Hewlett-Packard high-speed printers should be awarded to it rather than Dataprint, Inc., of Charlotte, North Carolina. The Chief Procurement Officer ("CPO") declined to consider the merits of Computerland's protest because he found it untimely.

FINDINGS OF FACT

On February 12, 1988, the Department of General Services issued an Invitation for Bids for the provision of Hewlett-Packard high-speed laser printers to the State for a twelve-month period. The printers were to be used for both educational and agency purposes. Computerland duly prepared and submitted its bid.

On February 9 the bids were opened and read aloud. Mr. Philip Pickard, Select Account Manager for Computerland, attended the bid opening and recorded the bid amounts. The bids were announced by category- Laser Jet 500 Plus, educational and agency,

and Laser Jet Series II, educational and agency. Mr. Pickard testified that he believed that Computerland was the low bidder in both the agency categories, based on the figures announced at the bid opening and his assumptions that the award would be by category and that the 2% resident vendor preference did not apply to Dataprint. On February 9, Mr. Pickard telephoned Dataprint and determined that it did not have an office or service personnel located in South Carolina.

General Services issued an Intent to Award on March 2, 1988, indicating that Dataprint was the lowest responsive and responsible bidder. Mr. Philip Pickard testified that he did not actually see the Intent to Award until Monday March 7, 1988, after he returned to work from being out sick for two days. Mr. Pickard admitted that the notice was probably received by Computerland on March 3 or 4. Mr. Ralph Pickard, Philip's father and the owner of Computerland, testified that Computerland most likely received the Intent to Award on March 4 and that he may have looked at it on that date. He confirmed that his son did not see the notice until the 7th.

On the day he looked at the Intent to Award and discovered that Dataprint was the low bidder, Mr. Philip Pickard telephoned the state official listed on the notice and inquired how the bids were evaluated. That official referred Mr. Pickard to his superior whom Mr. Pickard telephoned the next day. As a result of that conversation Mr. Pickard determined that he needed to talk with the Chief Procurement Officer, Ron Moore.

On March 9, 1988, Mr. Pickard wrote a letter to Mr. Moore, the text of which appears below.

> I am writing to request an appointment with you to discuss the State's intent to award a contract for laser printers to Dataprint, Inc. of Charlotte, North Carolina. (Bid number 1-205-02/09/88).
>
> We have some questions about the way in which this request for bids was evaluated. If it is possible I would like to have Mr. Clark of your office sit in with us at this meeting.
>
> Please call to set up an appointment as soon as possible, as the contract goes into effect on March 18, 1988.

Mr. Moore received the letter on Thursday afternoon, March 10th, and a meeting was scheduled for Monday, March 14. Mr. Moore testified that he asked Mr. Pickard on March 10, when he telephoned to schedule the meeting, and at the meeting whether Computerland intended to protest. According to Mr. Moore, Mr. Pickard said he was not protesting and did not want to protest because he had been through that process before.

The Pickards deny that they said they were not protesting. They claim they indicated that they did not want to protest if the matter could be resolved (meaning apparently that they did not wish to continue protesting).

At the meeting, Mr. Moore was unable to answer the Pickards' specific questions concerning how the bid was evaluated. He promised to telephone them with the information, which he did that same afternoon.

Two days later on March 16th, Philip Pickard drafted a letter which begins:

> Please accept this letter as our formal protest of your intent to award a state term contract for Hewlett-Packard laser printers.

There follow specific grounds for a protest and the closing paragraph:

> Since Dataprint of Charlotte, N. C. has never claimed resident vendor preference nor do they have an office or representatives in the state of South Carolina, they do not meet the requirements of this bid. The contract should be awarded to the lowest responsive bidder.

The CPO received the above letter on March 18.[1]

DISCUSSION AND CONCLUSIONS OF LAW

The threshold question presented to the Panel is whether the protest of Computerland is timely. The Procurement Code requires that a written protest be submitted to the CPO within "ten days after such aggrieved persons know or should have known of the facts giving rise thereto, but in no circumstance after thirty days of notification of award of contract." § 11-35-4210.

Computerland acknowledges that it most probably received the Notice of Intent to Award on or before March 4, 1988. Well before that date, Mr. Philip Pickard had learned the dollar amounts of the bid of his competitors at the bid opening and, through his own investigation, had learned, among other things, that Dataprint allegedly has no instate offices or service representatives. When it got the notice of Dataprint's successful bid on March 4, Computerland "should have known" immediately that it had

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[1] Apparently Mr. Philip Pickard entered the offices of General Services on March 17 after hours (6:30 P. M.), stamped his letter received on March 17 and deposited it where Mr. Moore would find it. The offices were open because of the presence of cleaning staff.

reasons sufficient for a protest. Cf. Dillon County vs. Lewis Metal Works, 332 S.E.2d 555 (S. C. App. 1985)(One does not need to appreciate the full extent of his damages for the limitations period to begin; it is enough that he recognizes that an actionable problem exists).

Because March 14 was the last day on which Computerland could timely file a protest, the March 16 letter, which is unquestionably a protest, is not timely. Computerland argues, however, that the March 9 rather than the March 16 letter was the initial protest letter.

The Panel finds this argument untenable. Nothing in the text of the letter alerts the reader that Computerland is invoking its right to protest a decision by General Services to award the contract to Dataprint or on what ground such protest is based. The letter requests an "appointment" to "discuss" the award. The letter states that Computerland has some "questions" about the way the bids were evaluated. The letter requests that a Mr. Clark from General Services "sit in with us at this meeting." Contrast this vague, almost conciliatory language with the precise language of the March 16 letter-"Please accept this letter as our formal protest of your intent to award. . . ." Both letters were drafted without the aid of an attorney.

The Panel has previously found that while protests are not to be judged by highly technical or formal standards, " § 11-35-4210(1) does require that the protest must in some way alert the parties to the general nature of the grounds for protest." In re:

Sterile Services Corp., 1983-17. Surely, it must also alert the parties that the author is protesting. See In re: American Telephone and Telegraph Co., 1983-12. The March 9 letter fails in both respects and cannot be considered a protest.

Computerland urges that the Procurement Code be construed liberally and that the time requirement be leniently applied. While the Panel recognizes the merit in Computerland's statement that the Code was designed to allow lay persons the opportunity to have their problems with state purchasing resolved without the assistance of lawyers, the existence of this feature has no bearing on the result reached here. Without deciding whether the ten-day limitation is jurisdictional, the Panel simply finds no reason for not strictly enforcing the limitation against Computerland. The General Assembly chose a short time period in recognition of the need for conducting state procurement in a timely, efficient manner. Nothing in the evidence points to any behavior by General Services that might warrant waiving or extending the limitations period or estopping General Services from asserting it.

Second, Computerland has bid on state contracts before and has been successful on a number of them. More importantly, Computerland (through Messrs. Pickard) has filed a protest prior to the one before the Panel now and has participated in hearings before the CPO and the Panel. Computerland's claimed ignorance as a lay person of what is required by the Code is belied by its considerable experience in this area.

The Panel finds the other arguments of Computerland

concerning timeliness equally unpersuasive. The arguments on the merits of Computerland's case are not considered. Also in light of the disposition reached here, General Services' Motion to Dismiss two grounds of Computerland's protest is denied as moot.

The March 30, 1988, Order of the CPO is affirmed and the protest of Computerland is hereby dismissed as untimely.

IT IS SO ORDERED.

Hugh K. Leatherman, Sr.
Chairman

Columbia, South Carolina
4-27-88, 1988

STATE OF SOUTH CAROLINA)
) BEFORE THE SOUTH CAROLINA
COUNTY OF RICHLAND) PROCUREMENT REVIEW PANEL
CASE NO. 1988-5

IN RE: PROTEST OF CNC COMPANY)
BID NO. 2-165/740-1105600-03/11/88-P) ORDER
)

This matter came before the South Carolina Procurement Review Panel ("Panel") for hearing on June 15, 1988 on the protest of CNC Company of the award of a contract to supply and install kitchen equipment at Denmark Technical College. Present at the hearing were the Protestant CNC, represented by Susan Lipscomb, Esq., the Division of General Services, represented by Helen Zeigler, Esq., Mr. Ed Philips of Southern Scale and Refrigeration Company, and Mr. &. Mrs. James P. Armstrong of General Sales Company. After considering the evidence presented, the Panel makes the following findings of fact and conclusions of law:

FINDINGS OF FACT

General Services issued a solicitation for furnishing, delivery and installation of cafeteria equipment at Denmark Tech. The original solicitation contained five pages of descriptions of the items required with a unit price and total price blank by each item. By amendment, General Services added three blanks to be filled in at the end of the item descriptions as follows:

Total Lot A-Equipment Cost...$_____
*Add Installation Cost.....$_____
TOTAL COST-LOT A...$_____

*Installation Charges are not subject to the 5% S. C. sales tax

Mr. Horace Sharpe of the Division of General Services at an

on-site prebid meeting explained the importance of breaking out installation charges for tax purposes. CNC had a representative at that meeting though he arrived late.

General Services received only three bids in response to its solicitation. Southern Scale did not complete the installation charges blank and with its bid filed a protest concerning the charges. CNC did not complete the Total Lot A-Equipment Cost, Add Installation Cost or the TOTAL COST-LOT A blank. General Sales completed the three blanks in question but bid several alternate items to the ones specified. The alternate items bid by General Sales would meet the needs of the State in essentially the same manner as those specified.

At the bid opening, General Services determined that Southern Scale and CNC were unresponsive because of their failure to include or specify installation charges. General Sales was awarded the contract at $59,936.76. When the total price columns are added, CNC's bid is $57,156.20. Nowhere on CNC's bid are installation charges listed separately.

CNC timely filed a protest urging the state to waive its failure to list installation charges as a technicality. The Chief Procurement Officer found CNC's bid to be unresponsive. CNC timely filed an appeal to the Panel but raised for the first time in its notice of appeal the additional ground that General Sales' bid was unresponsive because it bid alternates to some items specified.

CONCLUSIONS OF LAW

Reg. 19-445.2080 provides that minor informalitites or irregularities in bids may be waived by the procurement officer and the bidder given the opportunity to correct them. A minor informality or irregularity is "merely a matter of form or some inmaterial variation from the exact requirements" which has no effect or a trivial or negligible effect on price, quality, quantity or delivery and the correction of which will not affect the relative standing of, or otherwise prejudice, the bidders.

The bid documents themselves provide in pertinent parts:

> The State of South Carolina reserves the right to reject any and all bids and to waive all technicalities.
>
> WAIVER: The State reserves the right to waive any General Provisions, or minor specification deviation when considered in the best interest of the State.

CNC claims that its failure to list separately its installation charges was not an omission which rendered its bid unresponsive but was rather a technicality which could be waived by the State. CNC argues that because installation was a requirement of the contract, it was required to include installation in its unit and total price for each item and was given the option to ignore the final "Add Installation Cost" blank. CNC urges that a simple calculation of the total item prices by the procurement officer would have revealed in its bid price.

While it is true that the State had the authority to waive minor irregularities in bids, the Panel cannot find that the

failure to list installation charges was such a minor irregularity that it had no effect on price or on the standing of the bidders.

Mr. Horace Sharpe, the procurement officer in charge of the bid testified that after the solicitation was originally issued, General Services realized that the cost of installation would be substantial and it became concerned about calculating South Carolina sales tax on the cost of the equipment. There is no sales tax on installation charges. Because of the sales tax calculation problem, General Services decided that installation charges had to be broken out and listed separately. General Services then issued an amendment to specifically require that installation charges be broken out. The procurement officer stressed that requirement to the bidders at an on-site prebid meeting.

It is clear that General Services considered the installation charges blank an essential part of the bid. It is also clear that General Services both orally and in writing communicated to the bidders (including CNC) that it considered separate installation charges essential.

There is nothing in the bid documents which gives the impression that filling in total installation charges is optional. There is nothing in CNC's bid to indicate that it included installation charges in its total unit prices. General Services could not assume that CNC's bid was the total of its total unit price and it could not contact CNC after the bids were opened for

clarification. To do so would have been patently unfair to the other bidders and in violation of § 11-35-1520(7) and (8). See In Re: Protest of Ohmeda Company, Case No. 1987-5, 8-13-87. Given this, the Panel finds that CNC's failure to complete the installation charges blank rendered its bid nonresponsive.

In its appeal to the Panel, CNC raised the issue whether General Sales' bid was responsive because it bid alternate items to several of those specified in the solicitation. General Sales did not bid as specified on at least six of fourteen items. CNC offered opinion testimony by two witnesses, Mr. Roy Smith and Mr. William Boggs Corbin, that two items, 3 and 11, were not equivalent to the items specified. General Sales' witness James P. Armstrong testified that the alternates bid by General Sales for items 3 and 11 did fulfill the requirements of the specifications.

CNC, as the protestant, had the burden of proving that General sales' bid was not responsive. Clearly, alternate or substitute items were allowed by the bid documents (pg. 21 of the Record), so the only way General Sales would be unresponsive is if its alternates did not "meet the needs of the State in essentially the same manner" as those specified. In Re: Protest of McKenzie Tractor Company, Inc., Case No. 1984-1, 5-8-84; In Re: Protest of General Sales Company, Inc., Case No. 1983-5, 7-21-83. The Panel finds that CNC has not shown that General Sales' alternates will not perform essentially as required by the State. General Sales bid is responsive.

Because CNC's bid was unresponsive, General Sales is the

lowest responsive and responsible bidder and is entitled to award of the contract. The May 26, 1988 Order of the CPO is affirmed and General Sales is awarded the contract.

IT IS SO ORDERED.

Hugh K. Leatherman, Sr.
Chairman

June 23, 1988, 1988
Columbia, South Carolina

STATE OF SOUTH CAROLINA	)	BEFORE THE SOUTH CAROLINA
	)	PROCUREMENT REVIEW PANEL
COUNTY OF RICHLAND	)	CASE NO. 1988-6

IN RE:	)	
	)	
PROTEST OF HOMER L. SPIRES, MASONRY CONTRACTOR	)	O R D E R
	)	

This case came before the South Carolina Procurement Review Panel ("Panel") for hearing on August 31, 1988, on the protest by Homer L. Spires, Masonry Contractor ("Spires") of the award of a subcontract to Brik-Laco, Inc. ("Brik-Laco") for masonry work on the University of South Carolina Roost Dormitory. Present at the hearing were the protestant Spires, represented by Daniel T. Brailsford, Esq., the University of South Carolina ("USC"), represented by Joseph M. McCulloch, Jr., Esq., and the Division of General Services, represented by Helen Zeigler, Esq..

FINDINGS OF FACT

The basic facts of this case are undisputed. On November 10, 1987, USC solicited bids for the construction of additions and renovations to an athletic dormitory known as The Roost. Metro Construction Company ("Metro") of Charlotte, North Carolina, was awarded the contract on December 21, 1987. Work commenced on the project shortly thereafter.

On its bid, Metro listed itself as performing the masonry work. This listing was required by S.C. Code Ann. §11-35-3020(2b)(1976). When the prime contract was awarded to Metro, however, it actually contracted with Brik-Laco of

Charlotte to perform the masonry work. Metro sought out and solicited a bid from Brik-Laco after the bid date. This action was in violation of §11-35-3020.

On or about February 5, 1988, USC learned that Metro had provided fraudulent performance and payment bonds. On February 11, officials of USC and General Services met with Metro about the invalid bonds. Metro proclaimed innocence regarding the fraud and proposed that USC buy out its contract. To support that proposal Metro presented USC with a buyout package. (Record, Pltf.'s Ex. 3 and 6). When USC expressed no interest in the buyout proposition, Metro requested that it be given time to secure new bonds. USC gave Metro two weeks.

While examining the buyout package submitted by Metro, Mr. Ed Bass, USC's Director of Project Development, learned for the first time that Brik-Laco was on the job as masonry subcontractor. According to Mr. Bass, he advised the State Engineer, Jay Flanagan, of this on February 12, 1988.

After realizing the problems with Metro would probably result in suspension of work, USC became concerned about the safety of the construction site. Excavation on the site had left steep nearly vertical slopes which bordered on city streets. Drain pipes had been removed which increased the likelihood of erosion of the construction site and possible cave-ins. (See Record, Def.'s Ex. 1 and 2). USC also feared for the security and safety of the site in light of the rapidly approaching baseball season and the nearness of the

baseball field to the site. A final concern was that, if Metro could not complete the job, federal funding might be withdrawn if a replacement contractor were not found quickly. (See Record, Def.'s Ex. 5).

Faced with the above concerns, USC on February 10 declared an emergency to exist relative to the drainage problems. On that date, USC initiated a Request for Emergency Procurement Form SE-560 to procure the services of Hoppy's Construction Company in laying drain pipes at the construction site. The State Engineer approved this emergency procurement on February 22. (Record, p. 57).

Mr. Bass and USC further decided on February 17, 1988, that, if Metro failed to meet the deadline, USC would declare another emergency situation relative to completing the entire project.

On February 25, Metro's deadline expired without its obtaining replacement bonds. On that day Mr. Bass called Metro and terminated the contract for the Roost construction. On that day USC also declared an emergency regarding completion of the Roost project. Mr. Bass immediately contacted Prime South Construction Company to see if it was interested in taking over the construction contract at the price originally bid by it. Prime South had been the second low bidder in the original bid solicitation.

USC had previously decided that, if it had to terminate Metro, the best option was to negotiate with the second low bidder. According to Mr. Bass, USC reached that decision in

light of the perceived emergency situation, the potential loss of federal funds, the delay in rebidding and the unfairness in rebidding now that the original bid information had become public knowledge. USC was also concerned about how to handle the work that was already in progress.

According to Mr. James M. Woods, Vice-president of Operations for Prime South, when contacted by USC, Prime South expressed interest in completing the Roost project and was given several days to contact its suppliers and subcontractors to see if it could perform the contract at the price originally bid. The bids had expired on January 10, 1988, so on the date of Mr. Bass' phone call, Prime South was not obligated to USC to perform at the price originally bid or at all. Similarly, Prime South's suppliers and subcontractors were not obligated to Prime South.

Mr. Woods testified that either he or his assistant called the subcontractors and suppliers originally listed in Prime South's bid. The Protestant Spires had been listed on Prime South's bid as performing the masonry work (Record, p.28) and was one of the subcontractors contacted after Mr. Bass's call. Spires indicated that he could perform as originally bid.

According to Mr. Woods, Spires was asked only if he could perform at his original price; he was not offered the USC job. Mr. Woods admitted that Prime South relied on

Spires' answer in responding to USC but stated that Prime South had contacted at least one other masonry subcontractor for a quote in case the Spires quote fell through.

In any event, on February 29, 1988, USC and Prime South had a meeting at which Prime South agreed that it could perform the contract at its original price with some modification. At that meeting, USC for the first time asked Prime South whether it would keep four subcontractors hired by Metro who were already on the job.

According to Mr. Bass, USC chose the four subcontractors based on the buyout package submitted by Metro and based on USC's own observations about what was going on at the site. The four subcontractors were Hoppy's Construction, which was performing the site work, Owens Steel, which already had material on the site, Palmetto Wholesale, which had started some drawings, and Brik-Laco, the masonry subcontractor, which had been observed by USC on site.

USC was concerned both with fairness to the subcontractors already on the job and with protecting itself from possible lawsuits or liens being filed after Metro was terminated. There were other subcontractors listed by Metro as performing work or providing services, however, USC determined that only four subcontractors had performed sufficiently to be considered.

In fact, according to Mr. Cornell Sutton, President of Brik-Laco, no actual on-site work had been performed by Brik-Laco at that time although Brik-Laco had incurred certain mobilization costs. (Record, pp. 10-11, 13). Metro's buyout package showed Brik-Laco's mobilization costs at $2500. (Record, Pltf.'s Ex. 6). Mr. Sutton testified that Brik-Laco could have been bought out of its contract at that point for $20,000, however no one ever made or suggested a buyout offer.

Mr. Woods testified that Prime South told USC that Prime South would have to check the subcontractors out before it agreed to use them. Even though Prime South determined that Brik-Laco was not as strong financially as it should be, on March 4, 1988, Prime South agreed to keep Brik-Laco and the other three subcontractors. Mr. Woods testified unequivocally that Prime South would have preferred to use Spires but took Brik-Laco to please USC.

On March 4, USC initiated a second Request For Emergency Procurement Form SE-560 requesting the emergency procurement of Prime South's services in completing the Roost Project (Record, p. 73). The State Engineer did not approve this request until May 5, 1988. Mr. Bass explained the delay as occurring because his superiors misplaced the form he sent on March 4. According to Mr. Bass, the form in the Record at page 73 was not actually signed by USC on March 4 but was a replacement copy signed shortly before the State Engineer's approval on May 5. In any event, the State

Engineer did approve a Request for Authority to Execute A Construction Contract with Prime South on March 4. (Record, Def.'s Ex. 4).

The net effect of keeping Brik-Laco and rejecting Spires was to decrease USC's costs by approximately $147,000.[1] According to Mr. Woods, Prime South had discovered that Brik-Laco was probably not able to obtain a bond. Prime South advised USC that it needed some security against Brik-Laco's being unable to finish the job. Prime South suggested that it retain $120,000 of the money saved by USC as a "bond" for Brik-Laco. USC would get the remaining savings.

Mr. Bass testified that he felt that USC should get the benefit of the extra money rather than Prime South. He proposed that USC retain all the money and use it to purchase certain alternates to the base contract. The original contract with Metro including the alternates was about the same price as Prime South's base bid. Mr. Bass testified that he saw the opportunity to use the savings to

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1. According to Mr. Bass the savings was calculated as follows, with all figures rounded:

+ $897,000	(Spires contract price)
- $734,000	(Brik-Laco's price)
+ $ 51,000	(credit given when Brik-Laco was allowed to substitute cheaper material)
- $ 52,000	(Prime South's increased cost due to other subcontractors)
- $ 15,000	(Price USC paid to get alternates)
$147,000	(TOTAL)

get the same contract plus alternates at essentially the same price from Prime South as USC had from Metro.

USC and Prime South finally agreed that Prime South for $15,000 would perform alternate work valued at $162,000. USC would thereby realize a "gain" of $147,000. To satisfy Prime South's concern about Brik-Laco, USC agreed that, if Brik-Laco were unable to finish the job, USC would pay Prime South without limitation the difference between Brik-Laco's price and what it cost Prime South to complete the work. USC in effect guaranteed the performance of Brik-Laco to persuade Prime South to use it.

Although the March 4, 1988 letter from Mr. Bass to Prime South authorizing the start of work mentions that a change order will be issued for $161,000 (Record, p. 64), the price of the work ultimately was listed as $15,000. Nothing in the change order reflects the agreement between USC and Prime South. The State Engineer testified that he did not learn of the arrangement until the hearing before the Panel.

CONCLUSIONS OF LAW

Normally procurements of construction services such as those in issue here are pursuant to the procedures outlined in S.C. Code Ann. § 11-35-3020 (1976). These procedures amount to the issuing of an invitation for bids and the receipt and evaluation of competitive sealed bids with the contract going to the lowest responsive and responsible bidder. If the bids are unreasonable or noncompetitive or

the low bid exceeds available funds and circumstances will not permit the delay required to resolicit competitive sealed bids, an emergency procurement may be made provided emergency conditions then exist. Reg. 19-445.2110 (F)(1976).

Emergency procurements are governed by S. C. Code Ann. §11-35-1570 (1976), which provides:

> Notwithstanding any other provision of this code, the chief procurement officer, the head of a purchasing agency, or a designee of either officer may make or authorize others to make emergency procurements only when there exists an immediate threat to public health, welfare, critical economy and efficiency, or safety under emergency conditions as defined in regulations promulgated by the board; and provided, that such emergency procurements shall be made with as much competition as is practicable under the circumstances. A written determination of the basis for the emergency and for the selection of the particular contractor shall be included in the contract file.

The regulations referenced above occur at 19-445.2110. An "emergency" is defined as a "situation which creates a threat to public health, welfare, or safety such as may arise by reason of floods, epidemics, riots, equipment failures, fire loss, or such other reason as may be proclaimed by either the Chief Procurement Officer or the head of a governmental body or a designee of either office." To be an "emergency", the existence of such conditions must create a serious need for supplies, services, or construction that cannot be met through normal procurement methods and the lack of which would seriously threaten the

functioning of state government, the preservation or protection of property, or the health or safety of any person.

Emergency procurements are specifically limited to those supplies, services and construction items necessary to meet the emergency. Reg. 19-445.2110(C)(1976).

In the present case USC declared two separate emergencies. The February 10, 1988 emergency was declared because of USC's concern about the threat to safety and integrity of the construction site posed by poor drainage conditions. The emergency procurement made at that time consisted of purchasing the services of Hoppy's Construction Company to install drain pipes to divert water from the construction site (Record, p. 57). The Panel finds that an emergency did indeed exist on February 10, 1988 and that USC's subsequent emergency procurement was justified and was appropriately limited to the emergency at hand.

On March 4, 1988, USC declared the second emergency on the grounds that the "site needs immediate attention and time is a factor on the dormitory." (Record, p. 73). USC was concerned primarily about the hazard posed by the vertical slopes and the absence of a fence or other security device in light of the opening of baseball season. USC was

also interested that construction proceed on schedule to avoid the possible loss of federal funds.[2]

The Panel finds that, while an emergency may have existed on March 4 relative to the safety threat posed by the vertical slopes and lack of security, USC's procurement went well beyond that necessary to meet the emergency. The erection of a retaining wall or other supports would have removed the hazard posed by the vertical slopes. The installation of a fence would have alleviated the security problem. The emergency which existed on March 4 did not justify procurement without competition of a $3.629 Million contract for completion of the entire project.

Spires' claim is that Prime South and USC had an obligation to use it on the contract instead of Brik-Laco because Prime South originally listed Spires on its bid and relied on Spires' quotation to obtain its position as second low bidder and ultimate recipient of the contract. Spires' contention is that the listed subcontractors flow with the general contract.

2. Insofar as the possible loss of federal funds, the Panel does not find this to be a true emergency condition. USC found the threat to exist on its counsel's interpretation of a work stoppage clause contained in the loan agreement. (Record, Def.'s Ex. 5, p. 7, Sec. 15a.) There is no evidence that USC contacted its lender to negotiate or clarify this provision nor is there any evidence that the lender was threatening withdrawal of funds. USC simply assumed a worst case scenario and used its assumption to bolster its declaration of an emergency.

USC and Prime South argue that no duty was owed to Spires because the bids had expired at the time Prime South started negotiating with USC and, in any event, no duty was owed in the context of an emergency procurement. USC also argues that fairness to Brik-Laco precluded use of Spires in this case.

As stated earlier, the Panel finds that no emergency existed to justify the procurement of construction services by any means other than the competitive bidding procedure set forth in §11-35-3020. If this procedure had been used, Prime South would have been required to list Spires (or the masonry contractor of its choice), would been entitled to rely on Spires' quote, and would have been bound to use Spires if it eventually obtained the contract.

Assuming, arguendo, however, the existence of an emergency in this case, the Panel agrees that, in an appropriately declared emergency situation, the operation of the usual competitive bidding procedure is suspended. Section 11-35-3020 and the requirement that listed subcontractors be used does not per se apply to emergency situations. However, USC is incorrect in its assertion that it owed no duty to Spires.

The Procurement Code has as two of its stated purposes the assurance of "fair and equitable treatment of all persons who deal with the procurement system of this State" and the provision of "safeguards for the maintenance of a procurement system of quality and integrity with clearly

defined rules for ethical behavior on the part of all persons engaged in the public procurement process." S. C. Code Ann. § 11-35-20 (1976). Section 11-35-30 further provides that every contract imposes an obligation of good faith in its negotiation, performance and enforcement. The emergency regulations themselves recognize that even in an emergency such competition as is practicable must be obtained. Reg. 19-445.2110(E).

The existence of an emergency, therefore, does not justify the wholesale suspension of the basic policies and safeguards built into the Procurement Code. Even in an emergency, an agency must act fairly and ethically towards all parties concerned.

In this case, USC acted only with regards to its and Brik-Laco's interests. USC apparently never even considered the interests of Spires or of Prime South. Brik-Laco had not actually begun on-site work at the time Metro was terminated. A large part of what had been done by Brik-Laco was nothing more than that which any contractor would do in simply bidding a job, e.g., lining up suppliers, local workmen and equipment and visiting the job site. Indeed, Metro listed Brik-Laco's involvement as limited to mobilization costs of $2500. Brik-Laco's president testified that Brik-Laco would have consented to being bought out for $20,000 but no one offered. Finally, although it was apparently innocent, Brik-Laco was not even legitimately on the job because of Metro's violation of

§ 11-35-3020.

On the other hand, Spires had also expended time and money in bidding on the contract. Prime South relied on Spires' quote to obtain the position of next low bidder, which position put it in line to receive the contract when Metro was terminated. Spires reaffirmed its price when contacted by Prime South after the bids expired.[3] In reliance on Spires' reaffirmed quote, Prime South was able to accept USC's offer to complete the work begun by Metro.

According to its Vice-President, Prime South's stated preference was to stay with its original choice of masonry contractor, Spires. Prime South agreed to use Brik-Laco only in order to "please" USC, no doubt feeling coerced that its cooperation was tied to whether it received the contract. When Prime South doubted the ability of Brik-Laco to complete performance, USC took the highly questionable step of guaranteeing Brik-Laco's performance in an effort to persuade Prime South to keep Brik-Laco.

The equities on Spires' side warranted as much consideration as those on Brik-Laco's side. Notwithstanding this, all of USC's efforts were on behalf of Brik-Laco and

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3. It is arguable, though not an issue for the Panel to decide, that Prime South and Spires had a binding agreement on the basis of the phone conversation in which Spires reaffirmed its quote. See, Powers Constr. Co. v. Salem Carpets, 283 S. C. 302, 322 S.E. 2d 30 (S. C. App. 1984). If so, USC's conduct may have been in interference of this contract.

in intentional or reckless disregard of the rights of Spires. There is no evidence that USC ever balanced the rights of Spires and Prime South against the rights of Brik-Laco.

The Panel finds that USC's pressuring Prime South to use Brik-Laco without justification and its questionable guarantee of Brik-Laco's performance coupled with a complete disregard for Spires' interests were in contravention of the obligation of good faith and fairness imposed by the Procurement Code. Spires had the right to expect the same consideration of its rights by USC as Brik-Laco. Instead it was the victim of USC's arbitrary one-sided conduct.

The Panel holds that Spires is entitled to its bid preparation costs and attorney's fees in the amount of $7,108.05 as compensation for its treatment at the hands of USC. (Record, Pltf.'s Ex. 1 and 2).

Spires urges the Panel to exercise its authority and award it lost profits in the amount of $173,722.00. Assuming, without deciding, that it could award lost profits as an element of damages, the Panel declines to do so in this case. The Panel does believe, however, that this case calls for the award of something more than reimbursement.

Pursuant to its authority to award "such other and further relief as justice dictates", the Panel awards Spires $10,000 additional damages as a deterrent against further reckless and questionable conduct of the kind exhibited in this case, as a warning to other agencies that such conduct

will not be tolerated in the future, and as encouragement to other wronged vendors to bring such conduct to light.

Finally, although not bearing directly on the issues at hand, several facets of this case warrant comment from the Panel. First, the Panel condemns USC's guaranteeing without limitation the obligations of a subcontractor. The Panel finds that such conduct violates the intent and spirit of the Procurement Code in that it results in favoritism by the State of one contractor over another. Second and more importantly it subjects the State (and consequently its taxpayers) to open-ended liability and subverts the notion of the State getting the lowest responsible and responsive bidder on a job. Under no circumstances, including emergencies, should the CPO or procuring agencies tolerate such conduct.

Second, the Panel directs that the State Engineer's Office in the future more closely monitor the projects under its supervision. In this case, not only did the guaranty arrangement between USC and Prime South go unnoticed but apparently so did the unlawful presence of Brik-Laco on the job and Metro's violation of the subcontractor listing provision of the Code. It is incumbent on the State Engineer's Office to see that these types of flagrant violations of the Procurement Code do not occur.

Third, the Panel cautions that an emergency procurement is by its nature an extreme measure. The Procurement Code

sets up procedures carefully designed to balance the interests of the State and the vendors using the system. Therefore, because it suspends the normal safeguards built into the system, use of the emergency procurement procedure is not to be taken lightly by agencies.[4] The Panel warns General Services and procuring agencies that in the future declarations of emergencies to justify emergency procurements will be subject to strict scrutiny both as to existence and scope.

The June 6, 1988, decision of the CPO is overturned and USC is hereby required to pay to the protestant Spires the sum of $17,108.05 within sixty days of receipt of this Order.

IT IS SO ORDERED.

South Carolina Procurement Review Panel

By: Hugh K. Leatherman

Hugh K. Leatherman, Sr.
Chairman

Sept 14, 1988
Columbia, South Carolina

4. The Panel is aware that General Services made some changes to emergency procurement procedures in response to Legislative Audit Council's April 20, 1988 Statewide Review of Noncompetitive Procedures. The Panel encourages further constructive action in this regard.

STATE OF SOUTH CAROLINA	)	BEFORE THE SOUTH CAROLINA
	)	PROCUREMENT REVIEW PANEL
COUNTY OF RICHLAND	)	CASE NO. 1988-7

IN RE:	)	
	)	
PROTEST OF DAVIS-GARVIN AGENCY, INC.	)	O R D E R
	)	

I. INTRODUCTION

This matter came before the South Carolina Procurement Review Panel ("Panel") for hearing on June 22, 1988, on the protest of Davis-Garvin Agency, Inc., ("Davis-Garvin") of the Intent to Award to the Thomas C. Brown Agency ("Brown) a five-year contract for the reinsurance of property insured by the South Carolina Insurance Reserve Fund.

Present at the hearing before the Panel were the Protestant Davis-Garvin, represented by John A. Martin, Esq., and James B. Richardson, Jr., Esq., the Division of General Services, represented by Helen Zeigler, Esq., and Brown, represented by Helen T. McFadden, Esq. and Robert E. Kneece, Jr., Esq. All the parties presented evidence to support their respective positions and, after hearing and considering such evidence, the Panel finds as follows.

II. FINDINGS OF FACTS

On March 8, 1988, the State Budget and Control Board, Division of General Services ("General Services") issued a solicitation for bids to provide reinsurance for the property insured by the state Insurance Reserve Fund ("Fund"). Mr. James E. Bennett, Assistant Division Director in charge of the Fund, testified that the Fund is a division of the Budget and Control

Board that provides insurance coverage for the political subdivisions of the State. The Fund operates like a regular insurance company in that it issues policies to its insureds, which include state agencies and school districts, and collects premiums thereon. The Fund does not have stockholders or agents.

The solicitation in question requested bids for the provision of reinsurance of some $11 Billion worth of state property. Under the solicitation, the contractor would provide insurance for five years on all losses over and above $500,000 per risk, $1,000,000 per location, and $5,000,000 per occurrence up to a maximum of $745,000,000 per occurrence.

The bid solicitation contained the following provisions which are at issue here:

> Additional General Requirements.
>
> * * *
>
> 2. REINSURER QUALIFICATIONS: Any reinsurer submitting a bid must have an A.M. Best financial rating of A or better, and must be licensed as an insurer in the state of South Carolina. . . . Any participant on any layer of reinsurance must carry a Best's size category of V or better and all participants, in sum, must have capacity equivellent [sic] to Best's size category XI or better. A "cut through" endorsement must be included with bids in which a single company is submitting the bid and purchasing "re-reinsurance". A "step down" endorsement must be included for layered bids. A "joint and several" endorsement must be included for pro-rata bids. If the appropriate endorsement is not submitted the bid will be rejected.

(Record, p. 25)(Emphasis Added).

General Services issued Amendment No. 1 which provided:

> Add the following paragraphs on page 8 to:
>
> ADDITIONAL GENERAL REQUIREMENTS
> Item 2. REINSURER QUALIFICATIONS after the first paragraph:
> The wording for the three (3) endorsements is contained in Exhibit 9.
> * * *
> Add the following items to page 22 TABLE OF CONTENTS:
> 14. Exhibit IX - Wording for "cut through," "step down" and "joint and several" is added to the specifications.

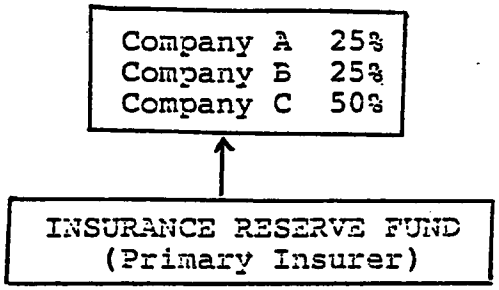
The bidding schedule which must be signed by the reinsurance company submitting the bid provides:

> A "cut through" endorsement MUST be included with bids in which a single company is submitting the bid and purchasing "re-reinsurance." A "step-down" endorsement MUST be included for layered bids. A "joint and several" endorsement MUST be included for pro-rata bids. If the appropriat [sic] endorsement is not submitted the bid will be rejected.

(Record, p. 27).

Mr. Bennett explained that one or more or all of the three types of endorsements could be required based on the way a bidder chose to structure its bid. The parties stipulated that the "step-down" endorsement is not an issue in this case. The other endorsements would be required in the following circumstances.

A joint and several endorsement would be required where more than one company is sharing the loss on a pro-rata basis. Mr. Bennett diagrammed that situation thusly:



Under this arrangement each reinsurance company would be responsible for the indicated percentage of any loss over the amounts insured by the Fund. The joint and several endorsement would make certain that, if one (or more) of companies A, B, or C became insolvent or financially unable to meet its obligations, the remaining companies would assume the insolvent company's liability and pay proceeds directly to the Fund.

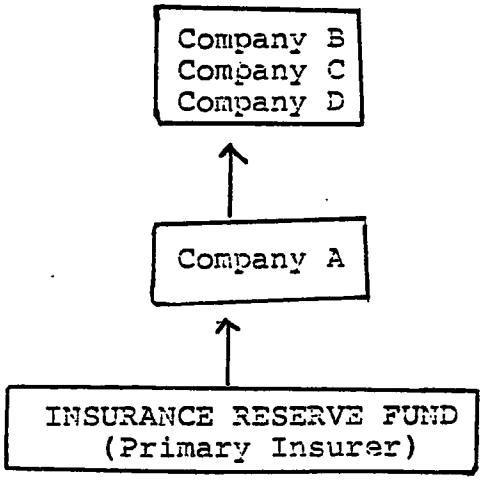
General Services by Amendment No. 1 attached to the bid solicitation the wording for the three endorsements as contained in Exhibit IX to the Amendment. The wording for the joint and several endorsement is as follows:

> It is agreed that in the event the Company issuing this policy shall become insolvent or financially unable to meet its obligations with respect to the property insurance as reinsured under this policy, the listed participating reinsuring Companies shall assume (pro rata according to their shares) the liability of such Company as reinsured under this policy, and shall pay any incurred losses directly to the insured on the basis of the liability of such Company without diminution because of its insolvency or financial inability to meet its obligations, provided the insured shall execute and deliver agreements, assignments or evidence of subrogation satisfactory to the above named Companies respecting any payment or assumption of liability made by them.
>
> By virtue of an agreement between the listed participating reinsurance companies, it is

> provided that if any shall become insolvent or financially unable to meet its obligations with respect to the property insurance as reinsured under this policy, the remaining Companies shall assume the liability of such Company as reinsured under this policy and shall pay any unpaid incurred losses directly to the insured, provided the insured shall execute and deliver agreements, assignments or evidence of subrogation satisfactory to such remaining Companies respecting any payment or assumption of liability by them.
>
> Any loss payment made by or on behalf of the above named Companies, or any of them, under this endorsement shall pro tanto relieve them of liability to the insurer and shall constitute a performance of the reinsurance obligation to the insurer.

(Record, p. 92).

The second type of endorsement, the "cut through", would be required when a single reinsurance company is itself purchasing re-reinsurance. Mr. Bennett diagrammed that situation thusly:



Under this arrangement, companies B, C, and D are in privity of contract and liable only to company A. The cut through endorsement would make Companies B, C, and D directly liable to the

Fund if Company A was placed in the hands of a receiver, assignee, trustee, or successor for the purpose of liquidation or on account of insolvency.

The wording for the cut through endorsement was attached to the bid solicitation as follows:

> In respect of the risks reinsured hereunder the reinsurer and the ceding company hereby agree that in the event that the ceding company shall go into the hands of a receiver, assignee, trustee or successor for the purpose of liquidation or on account of insolvency and if written notice be given to the reinsurer of such an event then the reinsurer in lieu of payment to the company shall pay to the assured the reinsurer's share of any loss or losses incurred by the ceding company which are within the limits, terms, and conditions of this policy. Provided that the liability of the reinsurer to the assured shall be reduced by the amount of payments made by the reinsurer on account of the same loss or losses to the company and provided further that the reinsurer shall be entitled to deduct from the amount of loss or losses any premiums or other money due to the reinsurer under this policy. It is fully understood and agreed by the ceding company that it is a condition precedent to this policy that any payments made directly to the assured shall absolve the reinsurer from making any payments to the company or its receiver, assignee, trustee or successor and shall constitute a full discharge and release of the reinsurer from any and all further liability in connection therewith.

(Record, p.92).

Mr. John B. Trussell III, the reinsurance manager for the Fund, testified that it was his understanding that bids might contain some slight variations from the wording provided. At the mandatory pre-bid conference, Mr. Trussell stated,

"We have drafted the wording that we want to use for joint and several endorsement, cut through endorsement and step down endorsement. We've done research and these are fairly standardized wordings and this is the wording that will be used, depending on how you arrange your bid." (Record, p. 108)(Emphasis Added).

In response to its solicitation, General Services received four bids. The bids were:

Agent	Company	Premium(yrly)
Davis-Garvin	International Ins. Co.	$4,095,428
Davis-Garvin	layered	$3,283,020
Davis-Garvin	layered	$3,280,020
Brown	Michigan Mutual	$2,092,229

General Services declared Brown to be the lowest responsive and responsible bidder at $2,092,229 yearly premium.

The reinsurance company listed by Brown, Michigan Mutual, has an A.M. Best's financial rating of "A" and is licensed in South Carolina. It has a Best's size category of at least V.

Under the Brown bid, Michigan Mutual is itself reinsured by a pool of companies, known as IRM (for "Improved Risk Mutual Insurance"), who have a total Best's size classification of Class XV. All but two of the companies have a Best's financial rating of "A" or better and all but three are licensed in South Carolina.

Based on the way Brown structured its bid, the bid documents and the comments by Mr. Trussell at the pre-bid conference[1]

[1] "KNEECE: I'm speaking of a pro-rata where Michigan Mutual is... IRM...lead company and then all of those companies are jointly and severally liable. TRUSSELL: In that case I would think that what the primary company in the case you describe being Michigan Mutual, we would need a cut through endorsement from IRM."(Record, p. 49)

required Brown to submit both a joint and several endorsement and a cut through endorsement. The endorsement submitted by Brown is contained in the IRM Reinsurance Certificate (Record, p. 40) and is verbatim (except in several minor instances) the joint and several endorsement provided by General Services. On its bidding schedule, Brown notes, "See attached IRM reinsurance certificate of joint and several liability." (Record, p. 27).

On May 11, 1988, General Services issued an Intent to Award the contract to Brown effective May 27, 1988. The current reinsurance contract expires at 12:01 a.m., July 1, 1988.

On May 23, 1988, the only other bidder, Davis-Garvin, filed a protest of the Intent to Award to Brown, citing four grounds going to the alleged nonresponsiveness of Brown's bid. The Chief Procurement Officer found in favor of Brown on June 10, 1988. Davis-Garvin appealed to this Panel on June 20, 1988, on three of the grounds it relied on below. General Services requested that the Panel hear the matter and issue its order as soon as possible.

III. CONCLUSIONS OF LAW

A. QUALIFICATION OF FIVE OF THE BIDDERS

The first argument asserted by Davis-Garvin is that two of the IRM group do not have a Best's financial rating of "A" or better and three of the IRM group are not licensed in South Carolina, all in violation of the bid requirements. Davis-Garvin concedes that Michigan Mutual has an "A" rating and is licensed in South Carolina.

The general provisions of the bid solicitation require "any reinsurer submitting a bid" to be "A" rated and licensed in South Carolina. (Record, p. 25). The bidding schedule has a blank for the name of the "Reinsurance Company(ies)." (Record, pg. 27). Mr. Bennett testified that the intent of this provision was to require the company contracting directly with the Fund, that is, the reinsurance company, to meet certain minimum standards.

Michigan Mutual is the reinsurer in Brown's bid. It meets the rating and licensing requirements contained in the bid documents. The IRM companies singled out by Davis-Garvin are re-reinsurers. The rating and licensing requirement by its terms does not apply to the IRM group. S. C. Code Ann. § 38-25-150(2)(1987 Cum. Supp.) exempts reinsurers from the licensing requirements imposed by the Insurance Commissioner. The Panel finds that Davis-Garvin's first ground is unpersuasive.

B. APPLICABILITY OF 10% SURPLUS STATUTE

Davis-Garvin's next argument is that the Brown bid is in violation of S.C. Ann. § 38-55-30 (1987 Cum. Supp.) and any contract with Brown based on the bid would be void ab initio. Section 38-55-30 provides:

> Except as otherwise provided in this title, no insurer doing business in this State may expose itself to any loss on any one risk in an amount exceeding ten percent of its surplus to policyholders. Any risk or portion of any risk which has been reinsured must be deducted in determining the limitation of risk prescribed in this section.

S.C. Code Ann. § 38-55-60 (1987 Cum. Supp.) provides that only reinsurance obtained from an approved reinsurer can be deducted as described above. An approved insurer must meet South Carolina capital and surplus requirements.

Davis-Garvin offered the opinion testimony of an expert on the meaning and applicability of §38-55-30. General Services and Brown objected to the qualification of Dr. Samuel T. Pritchett as an expert on reinsurance. The Panel has reviewed Dr. Pritchett's qualifications and his resumé (Record, p.245) and finds that Dr. Pritchett is well-qualified as an expert on reinsurance.

Dr. Pritchett testified that in his opinion § 38-55-30 applies to reinsurers and that the term "any one risk" contained therein means the maximum possible exposure on any one contract, in this case, $745,000,000. According to Davis-Garvin, the combined surplus of Michigan Mutual and IRM is approximately $2.035 Billion, allowing them to lawfully insure any one contract where the total risk is no greater than $203 Million. Davis-Garvin and their expert argue that Michigan Mutual and IRM cannot therefore, legally contract with the Fund to insure a maximum possible loss of $745,000,000.

General Services offered testimony that it has never considered § 38-55-30 to apply to contracts for reinsurance and that even if it did the term "any one risk" means the risk associated with any one piece of insured property.

In considering whether §38-55-30 applies, the Panel is required to give great weight to the administrative agency

charged with enforcing that section. Chief Insurance Commissioner John G. Richards V issued a written opinion on §38-55-30, which appears in the Record at page 240. Commissioner Richards also appeared before the Panel and testified that in his opinion reinsurers were exempt from licensing and regulation by the Insurance Commission by virtue of S.C. Code Ann. §38-25-150(2) (1987 Cum. Supp.), which exempts reinsurers from the licensing requirements of the Commissioner. Commissioner Richards testified that in his and his staff's opinion a reinsurer, because it is exempt from licensing requirements, is not subject to the regulatory standards enforced by the Commissioner, such as §38-55-30. Commissioner Richards testified that his office protected consumers from reinsurance abuses by strictly regulating the primary insurers and carefully examining their financial statements to insure that only reinsurance by approved reinsurers is deducted in risk limitation calculations.

The Commissioner also testified that in his opinion "any one risk" in §38-55-30 means the risk attaching to any one piece of property, which in this case is something considerably less than $745,000,000.

The Panel finds that §38-55-30 does not apply to reinsurers such as Michigan Mutual and IRI in the present case. The Brown bid is responsive on that ground.

C. CUT THROUGH ENDORSEMENT

Davis-Garvin's final argument is that Brown's bid is nonresponsive because it does not contain a cut through

endorsement. It is undisputed that a cut through endorsement was required because in Brown's bid Michigan Mutual, a single company, purchased "re-reinsurance." (Record p. 27). The only endorsement contained in Brown's bid is the endorsement on the IRM Reinsurance Certificate (Record, p.40), which contains language that is virtually verbatim from the wording for the joint and several endorsement given by the State in the solicitation documents. The cut through language given in the bid documents is not used in Brown's bid.

Davis-Garvin contends that Brown's failure to include language of the bid document's cut through endorsement means Brown has no cut through endorsement and is, therefore, nonresponsive. General Services and Brown urge that the essential intent of the cut through, i.e. to give the Fund direct access to the re-reinsurers, is met by the language contained in paragraph three of the IRM Reinsurance Certificate. General Services contends that Brown's failure to include the language contained in the bid documents is a mere technicality which can be waived by the State.

A close comparison of Brown's endorsement with the bid document's cut through reveals more that a superficial difference. Brown's endorsement provides that in the event Michigan Mutual "shall become insolvent or financially unable to meet its obligations," the IRM companies shall assume (pro rata according to their share) the liability of Michigan Mutual and shall pay any incurred losses directly to the Fund. (Record, p.40). The cut

through endorsement given in the bid documents provides that should Michigan Mutual "go into the hands of a receiver, assignee, trustee or successor for the purpose of liquidation or on account of insolvency" and if written notice is given to IRM, then IRM in lieu of payment to Michigan shall pay to the Fund the amounts owed by Michigan. (Record, p. 92).

Under Brown's endorsement, the Fund must demonstrate insolvency or financial inability to meet its obligations on Michigan Mutual's part before it can make a direct claim against IRM. Both of these conditions are inexact and not subject to ready determination. It is foreseeable that the question of insolvency or financial inability to meet obligations would support lengthy litigation and only upon conclusion of such litigation would the Fund be able to collect from IRM.

Under the bid cut through endorsement, all the Fund would have to do is give written notice to IRM that Michigan was in the hands of a receiver, assignee, trustee or successor for the purpose of liquidation or on account of insolvency and IRM would be obligated for Michigan's losses. The appointment of a receiver, assignee, trustee or successor is a concrete occurrence and one that is fairly easily proved. It is foreseeable that under this endorsement the Fund could attempt to collect directly from IRM without creating a lengthy legal issue.

It cannot be assumed that the language of the bid cut through endorsement was chosen without purpose. Mr. Bennett

testified that the language of the cut through was provided by Mendes & Mount, who are leading reinsurance attorneys. General Services stressed in its bid that if "re-reinsurance" was purchased by a single company, then a cut through endorsement "MUST" be included or the bid would be rejected. (Record, p. 27). General Services felt strongly enough about the wording of the endorsements that it issued an amendment specifically setting forth the language to be used. Mr. Trussell at the prebid conference stated that the Fund had done research and drafted the language "we want you to use" and which "will be used" in the bids. (Record, p. 47).

By uncontroverted testimony, due to the arrangement of its bid Brown was required by the solicitation documents to have both the joint and several endorsement and the cut through endorsement. The language in the Brown endorsement gives some direct rights to the Fund. However, the Panel finds that including the language of the bid cut through endorsement adds an element of certainty to, and gives the Fund clearer rights, in the situation where a receiver, assignee, trustee or successor is appointed. It cannot be said that the absence of these rights is a minor technicality which can be waived. The Panel finds that the substance of the cut through in the bid documents is not met by the language in the Brown endorsement.

For this reason, the Panel finds that the absence of language substantially similar to the bid cut through endorsement renders the Brown bid nonresponsive.

IV. CONCLUSION

Although it was not an issue raised by Davis-Garvin's protest, evidence was presented by all parties on the responsiveness of Davis-Garvin's three bids. Because the issue was not raised by the pleadings and because the Panel did not have enough evidence before it, the Panel makes no finding on the responsiveness of Davis-Garvin's three bids.

The Panel finds that Michigan Mutual meets the licensing and rating requirements required by the state and the Brown bid is responsive on that point. The Panel further finds that S. C. Code Ann. §38-55-30(1987 Cum. Supp.) is not applicable to reinsurers such as Michigan Mutual and IRM and the Brown bid is responsive on that point. The Panel finds that the bid submitted by the Thomas C. Brown Agency, Inc., does not contain a cut through sufficient to satisfy the requirements of the bid documents. The Brown bid is therefore nonresponsive on that point. Because a bid must be responsive in all aspects and Brown's bid clearly is not, the Panel reverses the Order of the CPO dated June 10, 1988. This procurement is remanded back to General Services for further disposition.

IT IS SO ORDERED.

Hugh K. Leatherman

Hugh K. Leatherman, Sr.
Chairman

June 23, 1988, 1988
Columbia, South Carolina

STATE OF SOUTH CAROLINA	)	BEFORE THE SOUTH CAROLINA
	)	PROCUREMENT REVIEW PANEL
COUNTY OF RICHLAND	)	CASE NO. 1988-8

IN RE:	)	
	)	
PROTEST OF TRYCO, INC.	)	O R D E R
	)	

This case came before the South Carolina Procurement Review Panel (the "Panel") for hearing on July 26, 1988, on the protest of Tryco, Inc. ("Tryco") of the award of a contract to upgrade a computer system belonging to the Legislative Audit Council. Present at the hearing were Mr. Terry R. Yon, President, and Mr. Carl R. Adams, Vice-president and General Manager, for Tryco and Ms. Helen Zeigler, Esquire, representing General Services Division.

The issues presented by the protest are whether Tryco is entitled to damages and, if so, the amount of damages. The parties agreed that the specification in question is ambiguous. Based on the record before it and the evidence presented at the hearing, the Panel finds the facts to be as follows:

FACTS

On May 12, 1988, the Materials Management Office ("MMO") issued a solicitation for bids entitled, "Hercules Graphics Cards, 20 MB Hard Cards and Installation of 3 1/2" Disk Drive for Legislative Audit Council, Columbia, S.C." The bid specifications in pertinent part provided:

SPECIAL PROVISIONS

> Furnish and deliver NEW HARD CARDS, GRAPHICS CARD AND INSTALLATION OF 3 1/2" DISK DRIVE complying with the enclosed description and/or

specifications and conditions as applicable to this bid notice.

* * *

SPECIAL CONDITIONS

The successful bidder must furnish, deliver and set in place required equipment with operational instructions given.

* * *

BIDDING SCHEDULE

QTY. & U/M	COMMODITY OR SERVICE	UNIT PRICE	TOTAL PRICE
LOT A			
9ea	20 MB Hard Cards (Must occupy only one[1] slot)	$____	$____
3	Hercules Monochrome Graphics Graphics	$____	$____
1	Removal of 5 1/4" Disk Drive and Installation of 3 1/2" disk drive for IBM 5150	$____	$____

The Protestant Tryco interpreted the above specifications to require the furnishing of the hard cards and the graphics cards but only the removing of the 5 1/4" disk drive and the installing of the 3 1/2" disk drive. Consequently Tryco did not bid the price of the 3 1/2" disk drive but included the cost of labor only. General Services intended for the vendor to furnish the disk drive.

When the bids were opened Tryco was the low dollar bidder at $2,917.98. The procurement officer, Venus Manigault, testified that when she looked at the price bid by Tryco for the disk removal and installation she questioned whether Tryco had included the cost of furnishing the 3 1/2" disk drive. Ms. Manigault called Tryco after the

bids were opened and was advised by Tryco that, in its opinion, the specs did not call for furnishing the 3 1/2" disk drive.

At the hearing, Ms. Manigault conceded that the specifications were ambiguous on whether the disk drive had to be furnished. Mr. Robert Bennett of Modern Office Machines testified that his company received the bid in question and it was his recollection that he called MMO to clarify whether the disk drive had to be furnished because it was not clear to him from reading the specification.

Notwithstanding the ambiguity, on June 8, 1988, the procurement officer, on the advice of her supervisor, awarded the contract to Nayco Computer Systems, the next low bidder at $3836.00. Nayco had advised Ms. Manigault that the cost of furnishing the disk drive was included in its bid.

On June 9, 1988, Tryco protested the award to Nayco. The Chief Procurement Officer found that the specifications were ambiguous and that, pursuant to Reg. 19-445.2065(B)(1), the solicitation should have been cancelled and the contract rebid. The work under the contract had been completed by the time of the protest so rebid was not possible. The CPO affirmed the protest but awarded no relief.

Tryco is before the Panel seeking damages. Tryco originally claimed entitlement to 28% of its quoted price or $817.03, which represents 13% profit and 15% overhead. At

the request of the Panel, Tryco submitted a statement of its costs and expenses in bidding the contract and pursuing the protest before the CPO and the Panel. At the hearing, Tryco abandoned its request for profit and agreed to accept its costs and expenses.

CONCLUSIONS OF LAW

The Panel affirms the CPO's findings that the specification in question is ambiguous and the contract should, therefore, have been rebid. General Services concedes the ambiguity but nevertheless argues that Tryco is not entitled to damages in this case because there is no evidence that Tryco would have been the low bidder if its bid had been responsive and because the ambiguity of the specification was the result of honest mistake rather than deliberate or grossly negligent behavior on state procurement's part.

The Panel agrees that the conduct of state procurement was not deliberate or grossly negligent in this instance. The Panel also recognizes that its authority to "order the computation and award of a reasonable reimbursement amount, including reimbursement of bid preparation costs" is discretionary rather than mandatory. S.C. Code Ann. §11-35-4210 (1976). However, the Panel does not accept General Services contention that Tryco is not entitled to some compensation in this case. Mr. Yon testified, admittedly after the fact, that Tryco could have supplied the disk drive at a cost of $250.00, which would have made

Tryco the low bidder. In addition, Mr. Yon testified that Tryco actively pursues state business and normally reduces its profit margin in an effort to get state contracts. No evidence was offered that cast doubt on Mr. Yon's assertion that his company would have been the low bidder if it had not been misled by the ambiguity in the specifications.

Pursuant to its authority under § 11-35-4210, the Panel finds that 15% of the original bid amount, which represents Tryco's projected overhead, is a reasonable reimbursement amount. General Services is ordered to pay to Tryco within 30 days of receipt of this Order the sum of $437.69.

IT IS SO ORDERED.

Senator Hugh K. Leatherman, Sr.
Chairman

Columbia, S.C.
5-1, 1988

STATE OF SOUTH CAROLINA	)	BEFORE THE SOUTH CAROLINA
	)	PROCUREMENT REVIEW PANEL
COUNTY OF RICHLAND	)	CASE NO. 1988-9

IN RE:	)	
	)	
PROTEST OF DAVIS-GARVIN AGENCY, INC.	)	O R D E R
	)	

This case came before the South Carolina Procurement Review Panel ("Panel") for hearing on August 31, 1988, on the protest by Davis-Garvin Agency, Inc., ("Davis-Garvin") of the August 1, 1988 Order of the Chief Procurement Officer ("CPO"). Present at the hearing before the Panel were the Division of General Services, represented by Helen Zeigler, Esq., The Thomas C. Brown Agency ("Brown"), represented by Helen T. McFadden, Esq., and Robert E. Kneece, Jr., Esq., and the protestant Davis-Garvin, represented by James B. Richardson, Esq..

FINDINGS OF FACT

A. Procedural History

This is the second case[1] to arise from the solicitation of bids to provide property reinsurance to the South Carolina Insurance Reserve Fund. Four bids were submitted in response to the solicitation - one by the Thomas C. Brown Agency and three by Davis-Garvin. After the bid opening, General Services issued a Notice of Intent to Award the contract to Brown as the lowest responsive and responsible bidder. Davis-Garvin protested and the Panel

1. This case is a companion to Case No. 1988-7 In Re: Protest of Davis-Garvin Agency, Inc. and reference is made to the June 24, 1988 Order of the Panel therein for additional background information.

found Brown's bid nonresponsive on the grounds that it lacked a cut through endorsement adequate to satisfy bid specifications. The Panel made no findings on the bids submitted by Davis-Garvin but instead remanded the matter back to General Services for further action. General Services examined all three Davis-Garvin bids, declared each of them nonresponsive and cancelled the bid solicitation. The Budget and Control Board subsequently awarded the contract to Brown.[2]

Davis-Garvin protested General Services' declaring its three bids nonresponsive. The CPO held a hearing on July 21, 1988, and issued his order on August 1, 1988 affirming the decision of General Services. This case is Davis-Garvin's appeal of that order. At the hearing before the Panel, Davis-Garvin made arguments on bids #2 and #3 but abandoned its appeal on bid #1.

B. Facts

General Services argues that the two Davis-Garvin bids are deficient in a number of areas. Its main contention is that the bids are nonresponsive because the companies participating in the bids failed to verify the extent of their participation and failed to indicate mutual agreement to the required joint and several endorsements.

2. After it cancelled the bid solicitation, General Services, with the approval of the Budget & Control Board, negotiated a contract with Brown outside the confines of the Consolidated Procurement Code. The negotiations were conducted pursuant to a 1982 exemption granted by the Budget & Control Board under the authority given it in S.C. Code Ann. § 11-35-710(1976).

General Services points to the language of the joint and several endorsement required by the bid specifications, which contemplates that the companies agreeing joint and several liability be listed or somehow referenced in the endorsement(Record, p. 195) and to the bid specifications, which require:

> All companies participating on a direct basis MUST be listed and the extent of their involvement MUST be indicated.
>
> Verification of participation MUST be provided by an officer of the company.
>
> The list of participating companies and their extent of involvement and their verification must be submitted with the bid or the bid will be rejected.

(Record, p. 170).

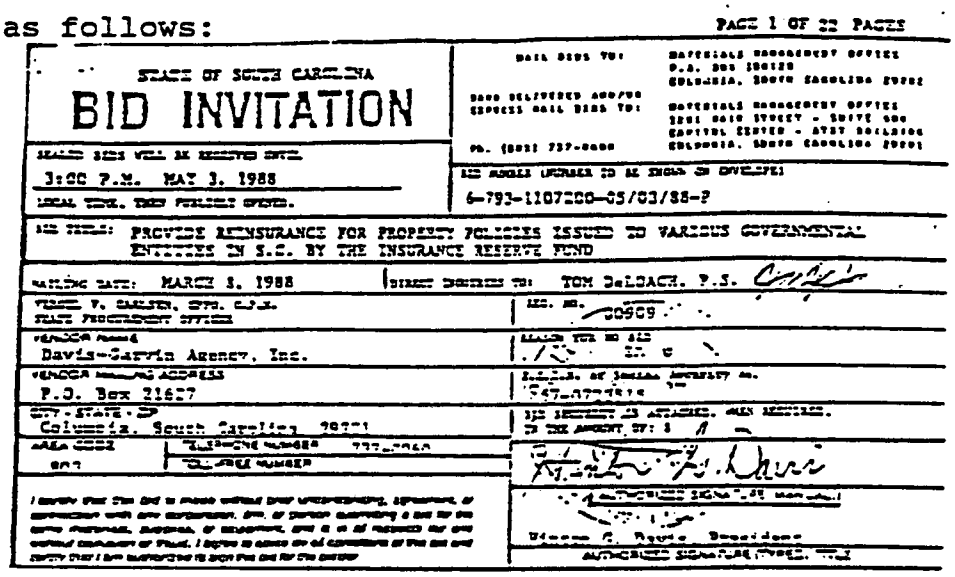
Davis-Garvin contends that each of its bids must be considered as a whole package rather than as a series of separate agreements. When viewed this way, Davis-Garvin argues, the bids are in compliance with the solicitation requirements.

To facilitate the understanding of the positions of the parties, the relevant portions of each bid are reproduced below. The bids are considered separately and in order.

BID #2

Bid #2 (Record, pp. 161-196) is a layered bid which shows International Insurance Company and Fireman's Fund Insurance Companies as unequal co-participants on the first $30 Million of insurance and Fireman's Fund as the sole

insurer of the remaining $715 Million layer. Bid #2 is set up as follows:



PAGE 1 OF 22 PAGES

STATE OF SOUTH CAROLINA

BID INVITATION

3:00 P.M. MAY 3, 1988

6-793-1107200-05/03/88-P

TITLE: PROVIDE REINSURANCE FOR PROPERTY POLICIES ISSUED TO VARIOUS GOVERNMENTAL ENTITIES IN S.C. BY THE INSURANCE RESERVE FUND

MAILING DATE: MARCH 3, 1988

DELIVER TO: TOM DeLOACH, P.S.

30909

Davis-Garvin Agency, Inc.

P.O. Box 21627

Columbia, South Carolina 29221

803

Hinton G. Davis, President

Figure 1.

(Record, p. 161)

Davis-Garvin contends that the signature of Hinton G. Davis on the above cover sheet is a blanket authorization of all the information and quotations contained in Bid #2. According to the testimony of Mr. Carl Reh, Marketing Manager for Davis-Garvin, Mr. Davis, on behalf of Davis-Garvin, has the authority to bind both International Insurance Company and Fireman's Fund Insurance Companies pursuant to a standing agency agreement. Mr. Reh admitted that Davis would not have the authority to bind Fireman's Fund for an amount as large as the bid in question absent specific permission. (Davis-Garvin makes the same argument with regard to bid #3 and its cover sheet).

Brown and General Services contend that all Mr. Davis' signature signifies is Davis-Garvin's agreement to the collusion and fraud statement to the left of the signature.

The statement that the signer is authorized to sign for the bidder applies only to Davis-Garvin because the insurance companies are not considered "bidders" under the solicitation.

The next relevant portion of Bid #2 is what Davis-Garvin has captioned Bidding Schedule #1. (There is no bidding schedule #2). 170

BIDDING SCHEDULE # 1

Bidding Schedule

Non-personal service to provide reinsurance on all property insurance (Fire, Inland Marine, Data Processing, and Business Interruption) excluding boiler and machinery, issued by the Insurance Reserve Fund, including engineering services.

Reinsurance for property losses (including Business Interruption) greater than $300,000 per risk per occurrence, $1,000,000 per location per occurrence, and $5,000,000 per occurrence up to a maximum of $745,000,000 per occurrence.

The following reinsurance rate is to be fixed for the term of the contract (60 months).

The bid MUST be firm for a period of 90 days from the date of the bid opening.

The State reserves the right to select either the option of paying the total annual premium or quarterly installment, whichever is deemed to be in the best interest of the State.

A "cut through" endorsement MUST be included with bids in which a single company is submitting the bid and purchasing "re-reinsurance". A "step down" endorsement MUST be included for layered bids. A "joint and several" endorsement MUST be included for pro-rata bids. If the appropriat endorsement is not submitted the bid will be rejected.

All companies participating on a direct basis MUST be listed and their extent of involvement MUST be indicated.

Verification of participation MUST be provided by an officer of the company.

The list of the participating companies and their extent of involvement and their verification MUST be submitted with the bid or the bid will be rejected.

Reinsurance Company(ies) SEE ATTACHED
(attach additional pages if needed)

Signature of Officer of Reinsurance Company(ies) SEE ATTACHED
(attach additional pages if needed)

Exposure eff. 2-15-88	X	Reinsurance Rate/$100	=	Annual Prem.
$11,128,881,090		.0295		$3,283,020.00

7-1-88/7-1-89 Reinsurance Premium if paid annually $3,283,020.00
7-1-88/7-1-89 Reinsurance Premium if paid in four quarterly installments $ 820,755.00

Figure 2.
(Record, p. 170)

For name of reinsurance company and signature of officer of company on the above, Davis-Garvin has "SEE

ATTACHED." Attached is the following on Davis-Garvin letterhead:

Davis-Garvin Agency, Inc. 171
Agent Broker

P.O. Box 21627 Columbia, South Carolina 29221

PARTICIPATING COMPANIES

I REINSURANCE PRIMARY LAYER - $30,000,000.

International Insurance Company and Fireman's Fund Insurance Companies will share this layer on a pro-rata basis of 66 2/3 and 33 1/3 respectively.

Joint and Several Endorsement and signed Verification of Participation included.

II REINSURANCE EXCESS LAYER - $715,000,000. EXCESS OF $30,000,000.

Fireman's Fund Insurance Companies will provide this entire layer.

Step Down Endorsement and signed Verification of Participation included.

(Record, p. 171)
Figure 3.

There are no signatures on this page. However, attached to it is the following "Verification of Participation."

VERIFICATION OF PARTICIPATION 172

Bidding Schedule

Non-personal service to provide reinsurance on all property insurance (Fire, Inland Marine, Data Processing, and Business Interruption) excluding boiler and machinery, issued by the Insurance Reserve Fund, including engineering services.

Reinsurance for property losses (including Business Interruption) greater than $500,000 per risk per occurrence, $1,000,000 per location per occurrence, and $1,000,000 per occurrence up to a maximum of $745,000,000 per occurrence.

The following reinsurance rate is to be fixed for the term of the contract (60 months).

The bid MUST be firm for a period of 90 days from the date of the bid opening.

The State reserves the right to select either the option of paying the total annual premium or quarterly installments, whichever is deemed to be in the best interest of the State.

A "cut through" endorsement MUST be included with bids in which a single company is submitting the bid and purchasing "re-reinsurance". A "step down" endorsement MUST be included for layered bids. A "joint and several" endorsement MUST be included for pro-rata bids. If the appropriate endorsement is not submitted the bid will be rejected.

All companies participating on a direct basis MUST be listed and their extent of involvement MUST be indicated.

Verification of participation MUST be provided by an officer of the company.

The list of the participating companies and their extent of involvement and their verification MUST be submitted with the bid or the bid will be rejected. $30,000,000. Primary Layer

Reinsurance Company(ies) INTERNATIONAL INSURANCE COMPANY
(attach additional pages if needed) 2/3 Participation

Signature of Officer of Reinsurance Company(ies) [signature]
(attach additional pages if needed)

Exposure eff. 7-15-88 X Reinsurance Rate/$100 = Annual Prem.

$11,778,881,790 .0179 $1,987,979.00 **

7-1-88/7-1-89 Reinsurance Premium if paid annually 1,987,979.00
7-1-88/7-1-89 Reinsurance Premium if paid in four quarterly installments .004788 531,000.00

*SEE ATTACHED JOINT AND SEVERAL ENDORSEMENT

**LAYER PRICING ONLY - SEE BIDDING SCHEDULE #1:

Figure 4. 492

This document clearly indicates that International Insurance Company, by James A. Dixon, its vice-president, has bound itself to 2/3 participation in the $30,000,000 primary layer. General Services agrees that the above verification meets the bid specifications as to the requirement of verifying extent of participation.

The verification also indicates "SEE ATTACHED JOINT AND SEVERAL ENDORSEMENT." Attached as the next page is the following:

Exhibit IX

JOINT AND SEVERAL ENDORSEMENT 173

It is agreed that in the event the Company issuing this policy shall become insolvent or financially unable to meet its obligations with respect to the property insurance as reinsured under this policy, the listed participating reinsuring Companies shall assume (pro rata according to their shares) the liability of such Company as reinsured under this policy, and shall pay any incurred losses directly to the insured on the basis of the liability of such Company without diminution because of its insolvency or financial inability to meet its obligations, provided the insured shall execute and deliver agreements, assignments or evidence of subrogation satisfactory to the above named Companies respecting any payment or assumption of liability made by them.

By virtue of an agreement between the listed participating reinsuring Companies, it is provided that if any shall become insolvent or financially unable to meet its obligations with respect to the property insurance as reinsured under this policy, the remaining Companies shall assume the liability of such Company as reinsured under this policy and shall pay any unpaid incurred losses directly to the insured, provided the insured shall execute and deliver agreements, assignments or evidence of subrogation satisfactory to such remaining Companies respecting any payment or assumption of liability made by them.

Figure 5.
(Record, p. 173)

This appears to the Panel to be a photocopy of a portion of Exhibit IX to the bid solicitation. Missing from this endorsement, however, is the third paragraph required by the specifications. That paragraph concerns the relationship of the insurance companies to each other in the

event payment is made under the joint and several liability agreement.[3]

General Services contends that International's joint and several endorsement is deficient because it is missing the third paragraph and because there is no indication with whom International is agreeing to be jointly and severally bound. The endorsement itself refers to "listed participating Companies" and "above named Companies" but no companies, including International, are listed. The endorsement is also unsigned.

Davis-Garvin argues that the missing paragraph affects only the other insurers and not the State and, therefore, its absence is waivable. Davis-Garvin further contends that it is clear from the entire bid #2 who the participating companies are.

Like International, Fireman's Fund also submitted a "Verification of Participation" signed by an officer of the company. General Services contends that, unlike International, however, Fireman's Fund did not verify the extent of its participation. Fireman's verification is as follows:

---

3. The missing paragraph provides, "Any loss payment made by or on behalf of the above named Companies, or any of them, under this endorsement shall pro tanto relieve them of liability to the insurer and shall constitute a performance of the reinsurance obligation to the insurer."

VERIFICATION OF PARTICIPATION

179

Bidding Schedule

Non-personal service to provide reinsurance on all property insurance (Fire, Inland Marine, Data Processing, and Business Interruption) excluding boiler and machinery, issued by the Insurance Reserve Fund, including engineering services.

Reinsurance for property losses (including Business Interruption) greater than $500,000 per risk per occurrence, $1,000,000 per location per occurrence, and $1,000,000 per occurrence up to a maximum of $745,000,000 per occurrence.

The following reinsurance rate is to be fixed for the term of the contract (60 months).

The bid MUST be firm for a period of 90 days from the date of the bid opening.

The State reserves the right to select either the option of paying the total annual premium or quarterly installment, whichever is deemed to be in the best interest of the State.

A "cut through" endorsement MUST be included with bids in which a single company is submitting the bid and purchasing "re-reinsurance." A "step down" endorsement MUST be included for layered bids. A "joint and several" endorsement MUST be included for pro-rata bids. If the appropriate endorsement is not submitted the bid will be rejected.

All companies participating on a direct basis MUST be listed and their extent of involvement MUST be indicated.

Verification of participation MUST be provided by an officer of the company.

The list of the participating companies and their extent of involvement and their verification MUST be submitted with the bid or the bid will be rejected.

Reinsurance Company(ies) FIREMAN'S FUND INSURANCE COMPANIES
(attach additional pages if needed)

Signature of Officer of Reinsurance Company(ies) Gerald D Dupre Vice Pres. Fireman's Fund Insurance Co.
(attach additional pages if needed)

Exposure eff. 7-1-88	X	Reinsurance Rate/$100	=	Annual Prem.
$11,178,881,098				

7-1-88/7-1-89 Reinsurance Premium if paid annually
7-1-88/7-1-89 Reinsurance Premium if paid in four quarterly installments

* SEE ATTACHED JOINT AND SEVERAL ENDORSEMENT AND STEP DOWN ENDORSEMENT
**SEE BIDDING SCHEDULE #1 FOR PRICING

MAY - 2 1988

10

Figure 6.

(Record, p. 179)

General Services points to the absence of any information (including pricing) which indicates the extent to which Fireman's Fund agrees to be bound.

Davis-Garvin again argues that the bid must be taken as a whole: Fireman's Fund's verification references Bidding Schedule #1, which references the information on Davis-Garvin letterhead. Davis-Garvin contends that following the trail of "see attacheds" yields the conclusion that Fireman's Fund has bound itself to provide 1/3 of the $30 Million first layer of insurance and the entire $715 Million second layer.

Finally in bid #2 is Fireman's joint and several endorsement in the form of a letter from Gerald A. Dupre, Excess and Special Risk Property Manager.

150

FIREMAN'S FUND
INSURANCE COMPANIES

MAY 8, 1988

ATTN: HINTON DAVIS
DAVIS-GARVIN AGENCY
91 BERNARDINA COURT
COLUMBIA, SOUTH CAROLINA 29212

RE: STATE OF SOUTH CAROLINA REINSURANCE FUND

DEAR HINTON:

THIS LETTER IS TO SERVE AS CONFIRMATION THAT THE FIREMAN'S FUND INSURANCE COMPANIES ARE AUTHORIZING QUOTATIONS FOR THE ABOVE DESIGNATED BID PROSPECT AND WILL INCLUDE THE FOLLOWING ENDORSEMENTS IN OUR REINSURANCE CONTRACT, WORDED AS FOLLOWS:

JOINT AND SEVERAL ENDORSEMENT

IT IS AGREED THAT IN THE EVENT THE COMPANY ISSUING THIS POLICY SHALL BECOME INSOLVENT OR FINANCIALLY UNABLE TO MEET ITS OBLIGATIONS WITH RESPECT TO THE PROPERTY INSURANCE AS REINSURED UNDER THIS POLICY, THE LISTED PARTICIPATING REINSURING COMPANIES SHALL ASSUME (PRO RATA ACCORDING TO THEIR SHARES) THE LIABILITY OF SUCH COMPANY AS REINSURED UNDER THIS POLICY, AND SHALL PAY ANY INCURRED LOSSES DIRECTLY TO THE INSURED ON THE BASIS OF THE LIABILITY OF SUCH COMPANY WITHOUT THE DIMINUTION BECAUSE OF ITS INSOLVENCY OR FINANCIAL INABILITY TO MEET ITS OBLIGATIONS, PROVIDED THE INSURED SHALL EXECUTE AND DELIVER AGREEMENTS, ASSIGNMENTS OR EVIDENCE OF SUBROGATION SATISFACTORY TO THE ABOVE NAMED COMPANIES RESPECTING ANY PAYMENT OR ASSUMPTION OF LIABILITY MADE BY THEM.

BY VIRTUE OF AN AGREEMENT BETWEEN THE LISTED PARTICIPATING REINSURING COMPANIES, IT IS PROVIDED THAT IF ANY SHALL BECOME INSOLVENT OR FINANCIALLY UNABLE TO MEET ITS OBLIGATIONS WITH RESPECT TO THE PROPERTY INSURANCE AS REINSURED UNDER THIS POLICY, THE REMAINING COMPANIES SHALL ASSUME THE LIABILITY OF SUCH COMPANY AS REINSURED UNDER THIS POLICY AND SHALL PAY ANY UNPAID INCURRED LOSSES DIRECTLY TO THE INSURED, PROVIDED THE INSURED SHALL EXECUTE AND DELIVER AGREEMENTS, ASSIGNMENTS, ASSIGNMENTS OR EVIDENCE OF SUBROGATION SATISFACTORY TO SUCH REMAINING COMPANIES RESPECTING ANY PAYMENT OR ASSUMPTION OF LIABILITY MADE BY THEM.

ANY LOSS PAYMENT MADE BY OR ON BEHALF OF THE ABOVE NAMED COMPANIES, OR ANY OF THEM, UNDER THIS ENDORSEMENT SHALL PRO TANTO RELIEVE THEM OF LIABILITY TO THE INSURED AND SHALL CONSTITUTE A PERFORMANCE OF THE REINSURANCE OBLIGATION TO THE INSURER.

CUT THROUGH ENDORSEMENT

IN RESPECT OF THE RISKS REINSURED HEREUNDER THE REINSURER AND THE CEDING COMPANY HEREBY AGREE THAT IN THE EVENT THAT THE CEDING COMPANY SHALL GO INTO THE HANDS OF A RECEIVER, ASSIGNEE, TRUSTEE OR SUCCESSOR FOR THE PURPOSE OF LIQUIDATION, OR ON ACCOUNT OF INSOLVENCY AND IF WRITTEN NOTICE BE GIVEN TO THE REINSURER OF SUCH AN EVENT THEN THE REINSURER IN LIEU OF PAYMENT TO THE COMPANY SHALL PAY THE ASSURED THE REINSURER'S SHARE OF ANY LOSS OR LOSSES INCURRED BY THE CEDING COMPANY WHICH ARE WITHIN THE LIMIT, TERMS AND CONDITIONS OF THIS POLICY. PROVIDED THAT THE LIABILITY OF THE REINSURER TO THE ASSURED SHALL BE REDUCED BY THE AMOUNT OF PAYMENTS MADE BY THE REINSURER ON ACCOUNT OF THE SAME LOSS OR LOSSES TO THE COMPANY AND PROVIDED FURTHER THAT THE REINSURER SHALL BE ENTITLED TO DEDUCT FROM THE AMOUNT OF LOSS OR LOSSES ANY PREMIUMS OR OTHER MONEY DUE TO THE REINSURER UNDER THIS POLICY. IT IS FULLY UNDERSTOOD AND AGREED BY THE CEDING COMPANY THAT IT IS A CONDITION PRECEDENT TO THIS POLICY THAT ANY PAYMENTS MADE DIRECTLY TO THE ASSURED SHALL ABSOLVE THE REINSURER FROM PAYING ANY PAYMENTS TO THE COMPANY OR ITS RECEIVER, ASSIGNEE, TRUSTEE OR SUCCESSOR AND SHALL CONSTITUTE A FULL DISCHARGE AND RELEASE OF THE REINSURER FROM ANY AND ALL FURTHER LIABILITY IN CONNECTION THEREWITH.

STEP-DOWN ENDORSEMENT

NOTWITHSTANDING ANYTHING TO THE CONTRARY, THIS REINSURANCE IS EXCESS OVER PRIMARY REINSURANCE AND CERTAIN SELF-INSURED RETENTION. IF ANY OF THE LIMITS OF LIABILITY OF THE PRIMARY OR UNDERLYING REINSURANCE ARE EXHAUSTED, DIMINISHED, OR NOT IN FORCE, THIS REINSURANCE SHALL THEN STEP DOWN AND ATTACH TO COVER SUCH LOSS WITHOUT GAP OR INTERRUPTION AGAINST BOTH THE PERILS AND/OR PROPERTY INSURED UNDER THIS AGREEMENT EXCESS OVER THE SELF-INSURED RETENTIONS.

I AWAIT YOUR ADVICES. THANK YOU AGAIN FOR GIVING FIREMAN'S FUND THE OPPORTUNITY TO WORK ON THIS ACCOUNT FOR YOU.

SINCERELY,

GERALD A. DUPRE JR.
EXCESS AND SPECIAL RISK
PROPERTY MANAGER

Figure 7.

(Record, pp. 180-181)

General Services found Fireman's joint and several endorsement defective because there is no indication who

Fireman's is agreeing to be bound with. Davis-Garvin argues the identity of the participating companies is obvious from the entire bid.

To summarize, General Services asserts that bid #2 is nonresponsive because Fireman's Fund has not verified the extent of its participation, International's joint and several endorsement is not signed and is missing a required paragraph, and neither joint and several endorsement names the companies who are agreeing to answer for the obligations of the other. General Services also argues that it is not possible to tell who the primary company is[4] or what the exact amount of the premium is.[5]

Bid #3

Bid #3 (Record, pp. 196-234) is structured essentially the same as bid #2 except that the first $30 Million layer is shared equally by International, Fireman's Fund and The Travelers Insurance Company.[6]

---

4. Amendment to Solicitation No. 1 states,"The primary company will be responsible for the payment of all reinsurance claims presented by the State of South Carolina." (Record, p. 194)

5. Mr. John Trussell, Manager of the Property & Casualty Department for the Insurance Reserve Fund, calculated the various ways one could figure the premium bid in bid #2. The main problem is whether the amount listed on International's Verification of Participation should be added or subtracted from the amount listed on Bidding Schedule #1.

6. Mr. Trussell also testified as to the confusion in bid #3 whether The Travelers Insurance Company or The Travelers Insurance Companies was the participating company. The Panel considers this harmless error which does not, by itself, render bid #3 nonresponsive.

Bidding Schedule #1 for bid #3 and its attachment are reproduced as follows:

BIDDING SCHEDULE # 1

206

Bidding Schedule

Non-personal service to provide reinsurance on all property insurance (Fire, Inland Marine, Data Processing, and Business Interruption) excluding boiler and machinery, issued by the Insurance Reserve Fund, including engineering services.

Reinsurance for property losses (including Business Interruption) greater than $300,000 per risk per occurrence, $1,000,000 per location per occurrence, and $1,000,000 per occurrence up to a maximum of $745,000,000 per occurrence.

The following reinsurance rate is to be fixed for the term of the contract (60 months).

The bid MUST be firm for a period of 90 days from the date of the bid opening.

The State reserves the right to select either the option of paying the total annual premium or quarterly installment, whichever is deemed to be in the best interest of the State.

A "cut through" endorsement MUST be included with bids in which a single company is submitting the bid and purchasing "re-reinsurance". A "step down" endorsement MUST be included for layered bids. A "joint and several" endorsement MUST be included for pro-rata bids. If the appropriate endorsement is not submitted the bid will be rejected.

All companies participating on a direct basis MUST be listed and their extent of involvement MUST be indicated.

Verification of participation MUST be provided by an officer of the company.

The list of the participating companies and their extent of involvement and their verification MUST be submitted with the bid or the bid will be rejected.

Reinsurance Company(ies) SEE ATTACHED
(attach additional pages if needed)

Signature of Officer of Reinsurance Company(ies) SEE ATTACHED
(attach additional pages if needed)

Exposure eff. 7-1-88	X	Reinsurance Rate/$100	=	Annual Prem.
$11,128,881,000		.0295		$3,283,920.00

7-1-88/7-1-89 Reinsurance Premium if paid annually $3,283,920.00
7-1-88/7-1-89 Reinsurance Premium if paid in four quarterly installments $ 820,980.00

Figure 8.
(Record, p. 206)

207

Davis-Garvin Agency, Inc.

P.O. Box 21627 Columbia, South Carolina 29221

PARTICIPATION COMPANIES

I REINSURANCE PRIMARY LAYER - $30,000,000.

International Insurance Company, The Travelers Indemnity Companies and Fireman's Fund Insurance Companies will share this layer on a pro-rata basis of 33 1/3, 33 1/3 and 33 1/3 respectively.

Joint and Several Endorsements and signed Verification of Participation included.

II REINSURANCE EXCESS LAYER - $715,000,000. EXCESS OF $30,000,000.

Fireman's Fund Insurance Companies will provide this entire layer.

Step Down Endorsement and signed Verification of Participation included.

Figure 9.
(Record, p. 207)

As with bid #2, no signatures appear on the attachment which would indicate that Fireman's or Travelers agrees to the percentage listed for it. International verifies its percentage in its Verification of Participation.

Regarding Fireman's Verification of Participation and joint and several endorsement, General Services finds the same defects in bid #3 as in bid #2.

In addition in Bid #3, General Services questions whether International has even submitted a joint and several endorsement. Although International's verification states, "SEE ATTACHED JOINT AND SEVERAL ENDORSEMENT", there is nothing purporting to be a joint and several endorsement for the next fifteen pages. At that point appears a document identical to that reproduced as Figure 5 herein. There is no reference to International nor is there any signature.

Finally, General Services attacks the Verification of Participation and joint and several endorsement submitted on behalf of Travelers. As with Fireman's, there is no information, including pricing, which indicates the extent to which Travelers agrees to be bound. Davis-Garvin points to the references back to Bidding Schedule #1 and the information on Davis-Garvin letterhead. The Verification of Participation is as follows:

VERIFICATION OF PARTICIPATION 233

Bidding Schedule

Non-personal service to provide reinsurance on all property insurance (Fire, Inland Marine, Data Processing, and Business Interruption) excluding boiler and machinery, issued by the Insurance Reserve Fund, including engineering services.

Reinsurance for property losses (including Business Interruption) greater than $350,000 per risk per occurrence, $1,000,000 per location per occurrence, and $1,000,000 per occurrence up to a maximum of $741,000,000 per occurrence.

The following reinsurance rate is to be fixed for the term of the contract (60 months).

The bid MUST be firm for a period of 90 days from the date of the bid opening.

The State reserves the right to select either the option of paying the total annual premium or quarterly installment, whichever is deemed to be in the best interest of the State.

A "cut through" endorsement MUST be included with bids in which a single company is submitting the bid and purchasing "re-reinsurance". A "step down" endorsement MUST be included for layered bids.. A "joint and several" endorsement MUST be included for pro-rata bids. If the appropriate endorsement is not submitted the bid may be rejected.

All companies participating on a direct basis MUST be listed and their extent of involvement MUST be indicated.

Verification of participation MUST be provided by an officer of the company.

The list of the participating companies and their extent of involvement and their verification MUST be submitted with the bid or the bid will be rejected.

Reinsurance Company(ies) THE TRAVELERS INDEMNITY COMPANY
(attach additional pages if needed)

Signature of Officer of Reinsurance Company(ies) [signature]
(attach additional pages if needed) ASSISTANT SECRETARY

Exposure eff. 7-1-88	X	Reinsurance Rate/$100	=	Annual Prem.
$11,128,881,298				**

7-1-88/7-1-89 Reinsurance Premium if paid annually _____
7-1-88/7-1-89 Reinsurance Premium if paid in four quarterly installments _____

*SEE ATTACHED JOINT AND SEVERAL ENDORSEMENT

**SEE BIDDING SCHEDULE # 1

Figure 10.
(Record, p.233)

Travelers' joint and several endorsement is in the form of a letter to Davis-Garvin from Robert J. Chaffin, Asst. Secretary for Travelers, which states in its entirety,"As regards my quotation for the account of The State of South Carolina Insurance Reserve Fund and representative for the Travelers Indemnity Companies, may this letter serve as our agreement to provide insurance coverages including a joint and serveral [sic] endorsements [sic] as provided in Exhibit IX of the insured's bid specifications." (Record, pg. 234).

Attached is a joint and several endorsement identical to that reproduced as Figure 5 herein. Notwithstanding Mr.

Chaffin's statement that Travelers will agree to be bound as required by Exhibit IX to the bid specifications, the joint and several endorsement provided is missing the required third paragraph. It is also unsigned and does not identify the companies, including Travelers, who agree to be bound.

To summarize, General Services finds bid #3 nonresponsive because neither Fireman's nor Travelers verifies the extent of its participation, Travelers' and International's endorsements are unsigned and missing a required paragraph, no endorsement identifies the companies participating and no primary company can be identified.

CONCLUSIONS OF LAW

To be considered responsive, a bid must meet fully all the conditions and requirements set forth in the solicitation documents and any amendments thereto. Conversely, only those criteria set forth in the documents may be used to evaluate bids. S. C. Code Ann. §11-35-1520(7)(1976).

Mr. Trussell testified that the requirements of the bid in this case were in large part fashioned in response to past problems experienced by the Insurance Reserve Fund in soliciting insurance. According to Mr. Trussell, the Fund had four main areas of concern, considering the volume of insurance involved in this case: Financial ability of the insurers; Having one primary company to which all claims could be made; Privity between the State and all levels of insurers up to the total amount of insurance coverage; and

Verification by each insurer of the fact and extent of participation. This last requirement was designed to prevent an agent from listing a company as providing coverage when in fact no coverage exists.

The Panel finds that neither bid of Davis-Garvin meets the requirements concerning privity and verification.

The Verification of Participation of Fireman's in both bids fails to indicate the extent of participation. The reference back to Bidding Schedule #1 is for pricing only and does not clarify the extent of participation. The unsigned statement on Davis-Garvin stationery does shed light on what was intended by Davis-Garvin; it does nothing to bind Fireman's to the State. The statement in Mr. Dupre's letter "authorizing quotations" for the bid solicitation is of no comfort because there is no indication what quotations were authorized. Likewise, the signature of Hinton Davis on the bid cover sheet is not sufficient since it is not apparent from the bid documents what authority, if any, Mr. Davis has to bind Fireman's Fund or any other participating insurance company.

Davis-Garvin argues that there is no space on the Verification of Participation form which would alert it to indicate the extent of Fireman's participation. The Panel finds this argument disingenuous given the perfectly conforming Verification of Participation submitted by Davis-Garvin on behalf of International.

The Verification of Participation submitted on behalf of Travelers in bid #3 suffers the same defects as Fireman's'.

The Panel also finds the joint and several endorsements submitted by International in bid #2 and Travelers in bid #3 to be nonresponsive because they are missing the required third paragraph. In In re Protest of Davis-Garvin (1988-7), the Panel found the wording of the joint and several endorsement in the bid invitation to be mandatory. Davis-Garvin sought to hold its competitor Brown to that standard in the earlier case. Davis-Garvin must live with that same standard in this case.

The Panel additionally finds bids #2 and #3 nonresponsive in that the joint and several endorsements of Fireman's and International in bid #2 and of Fireman's and Travelers in bid #3 fail to indicate who the participating companies are. The purpose of the joint and several endorsement is to have co-participants guarantee that if one or more of them becomes insolvent, the others will step in and assume the obligations of the financially troubled institution. It is no doubt important to the insurers to know whose obligations they are guaranteeing. It is equally important to the State to know this so it can be assured that all participating companies have agreed to joint and several liability. None of the joint and several endorsements mentioned above is sufficient to give the State this assurance.

Finally the Panel finds bid #3 nonresponsive because there is no joint and several endorsement from International. Although International's Verification of Participation states "SEE ATTACHED JOINT AND SEVERAL ENDORSEMENT", there is no endorsement for fifteen pages. The endorsement found at that point does not mention International (or any other company) and is unsigned by anyone. The endorsement is simply a photocopy of the form provided in the bid invitation. The State is not required to guess that this is the endorsement referred to as attached.

In his testimony, Mr. Trussell noted the importance of having a firm, unambiguous contract in this case. The worst case single loss anticipated under this contract is $750,000,000, as might occur in the Charleston area in a hurricane or earthquake. With a possible loss of that magnitude, it is essential to the State that there be no room in the contract for coverage to be denied or even litigated. None of the defects discussed above are technical. They each go to the heart of what the State was bargaining for in this case. The bids of Davis-Garvin in no way approach the firm, unambiguous contract contemplated by the bid invitation.

The August 1, 1988 decision of the CPO is affirmed in accordance with the above discussion.

IT IS SO ORDERED.

South Carolina Procurement Review Panel

By: _____
Hugh K. Leatherman, Sr.
Chairman

Sept 14, _____, 1988
Columbia, South Carolina

STATE OF SOUTH CAROLINA	)	BEFORE THE SOUTH CAROLINA
	)	PROCUREMENT REVIEW PANEL
COUNTY OF RICHLAND	)	Case No. 1988-11
IN RE: PROTEST OF CONWAY CHILD DEVELOPMENT CENTER	)	O R D E R

This case came before the South Carolina Procurement Review Panel ("Panel") for hearing on September 29, 1988, on the protest of Conway Child Development Center ("CCDC") of the intent by the Health and Human Services Finance Commission ("HHS") to award a contract for child care services in Horry County to Concern Parents and Friends of Children ("Concern Parents"). Present at the hearing were CCDC, represented by Cameron B. Littlejohn, Jr., Esq., HHS represented by Candace Berlew, and the Division of General Services, represented by Helen Zeigler, Esquire. Concern Parents was present but did not participate.

After hearing all the evidence, the Panel makes the following findings of fact and conclusions of law.

FACTS

HHS issued a Request for Proposals on June 3, 1988, soliciting child care services for needy families in Horry County for the fiscal year 1988-89. (Record, p. 284). The proposals were to be evaluated on demonstrated financial and technical capability and on evidence of the understanding of the problem and the objectives to be achieved. Evaluation criteria in order of importance were:

> (1) Agency Review of Child Development Program Currently Operated (On-site Program Review and Facility Regulatory Review);

(2) Experience Related to Child Development and Qualifications of Staff;

(3) Unit Cost;

(4) Understanding the Problem and Approach.

(Record, p. 290).

HHS chose a panel of three experienced persons to evaluate the proposals - two from HHS staff and one from the Department of Education. Each team member received the proposals submitted, a copy of "Child Development Quality Assurance Standards" (Record, p. 345), and forms on which to perform their evaluations of the proposals. Each team member independently reviewed the proposals and rated each proposal on an Evaluation sheet. (Record, p. 221-239).

The sheet lists various evaluation factors and assigns a total number of points available for that category according to the order of importance set forth in the Request for Proposals. Each evaluator awarded points in each category up to the total number of points available. Comments were recorded on attached pages captioned "Handwritten Analysis Describing Rationale Leading to Specific Conclusions on the Assets and Deficiencies: Reference Specific Language in the Proposal."

Two categories on the evaluation sheet were not completed by the team members but were supplied to them. (Record, p. 221). Category C, Unit Cost, Unit Price was supplied by Dave N. Smith, Jr., Coordinator of Commission Services, Fiscal Manager. This score was based on a simple mathematical calculation. The formula is lowest amount bid divided by amount bid in the

proposal being evaluated X 20 (highest number of points available for that category).

The other score which was supplied to the team was Category A, On-site program review. This score was supplied by Mr. Robert Coffey in HHS' Program Monitoring Division. Mr. Coffey generated the scores by converting (in accordance with a mathematical formula) "raw" scores given after an on-site inspection of the bidders' facilities.

The on-site inspection was conducted by two employees of HHS using an eleven page worksheet entitled "Quality Assurance Documentation Summary." (Record, p. 471-481). This document lists various aspects of child care (such as staff-child interaction, child-child interaction, health and safety, staff qualifications), breaks them down into subcategories and assigns a total point value to each. The evaluator is asked to assign points in each category up to the total number of points available.

Along with the Quality Assurance Documentation Survey, the evaluators were to use the "Child Development Quality Assurance Standards". (Record, p. 345). This document sets outs the standards, policies, and philosophies that each provider is expected to meet for each aspect of child care. For example, the following is listed as the first goal and assigned 20 possible points:

> A. Staff shall interact frequently with children. Staff shall express respect for and affection toward children by smiling, touching, holding, and speaking to children at their eye level throughout the day.

Criteria for Compliance:

> Children are treated impartially by staff.
>
> Staff are relaxed with the children when touching, talking with, and approaching them.

(Record, p. 348). The on-site review team were to observe each employee with respect to how well he or she met the above criteria and assign an overall point value up to 20 for that particular day-care center.

Two agencies submitted proposals in response to the Request For Proposals: CCDC, directed by Mr. Amidu Nallo and Concern Parents, directed by Ms. Dorethea Bowens. CCDC under the direction of Mr. Nallo has been in operation for 8 years and has unsuccessfully bid on the contract in question several times in the past.

Concern Parents is a new corporation formed specifically for the purpose of obtaining this contract. It consists of the same persons who formerly provided day-care under this contract under the auspices of Horry County Council. The Council apparently determined that it no longer wished to supervise and provide day-care pursuant to the HHS program. The former employees, parents and "friends of children" decided to bid for the contract in order to continue the service. Horry County Council is not connected with Concern Parents.

Because Concern Parents as an entity had no program currently in operation, HHS visited the Horry County program then in operation to obtain on-site review scores. Mr. Coffey testified that, for a number of years, it has been the policy of

HHS to credit a new entity with a prior entity's experience if the new entity retains essentially the same staff personnel. Mr. Coffey stated that this policy allows a new entity to be evaluated using current scores generated from the inspection of the former entity.

When the evaluation of the panel was complete, the scores were as follows:

	CCDC	Concern Parents	
Evaluator 1	58.10	87.99	
Evaluator 2	69.55	91.41	
Evaluator 3	60.94	85.03	
TOTAL	188.59	264.43	(out of 300)

The on-site review score incorporated in the above were 11.05 for CCDC and 21.54 for Concern Parents out of 25 total points.

Based on its evaluation, HHS announced its intention to award the contract to Concern Parents.

ISSUES

CCDC protests on two grounds. First, it claims that it was improper for HHS to evaluate Concern Parents using the Horry County Council Program. CCDC contends that the experience of the Horry County program cannot be transferred because of the absence of Horry County Council in the new entity and the lack of evidence that the same staff personnel will be involved.

The Request for Proposals contemplates that prior experience can be used by requiring, "if not currently operating a program

providing child development services, describe specifically any experience which is related to this service." (Record, p. 297). Further, Mr. Coffey testified that it is HHS' long-standing policy to rate a new entity with the same staff personnel by reviewing the former entity.

The Panel finds that, as long as a new entity has the same key staff personnel, it is not unreasonable to measure future performance by observing the current performance of the former entity. Indeed, it gives a truer picture than treating the new entity as having no experience at all.

The Proposal submitted by Concern Parents lists the same staff personnel as are currently employed in the Horry County Council program. CCDC offers no evidence that this listing isn't genuine. The Panel finds that HHS properly considered the experience of the Horry County Program in evaluating Concern Parents.

Second, CCDC argues that one of the reasons it scored low on the Quality Assurance Document Summary and the final evaluation sheet is that it is being operated at odds with the general philosophy of HHS. CCDC contends that agreeing with this philosophy is not one of the state criteria.

The Request for Proposals requires the contractor to "comply with all the requirements of a comprehensive child development program as specified in the Child Development Quality Assurance Standards." (Record, p. 288). Those standards mandate that curriculum be tailored to the children's differences in rates of

learning. CCDC admits that, at the time of review, its program was operated differently from this philosophy.

This same problem apparently existed in 1986 when CCDC appeared before the Panel protesting the award of this same contract for that year. In Case No. 1986-10, In Re: Protest of Conway Child Care, Inc., CCDC (under the name "Conway Child Care") attacked the inclusion of the Quality Assurance Standards as criteria. The Panel found, "although CCC seems to differ with the [quality assurance standards] as to its philosophy or approach toward child care, the [standard] was properly used as part of the evaluation process."

In a Request for Proposals the evaluation factors (only one of which is price) and their relative importance are set forth in the bid documents. "No other factors or criteria shall be used in evaluation and there shall be adherence to any weightings specified for each factor in the request for proposals." S.C. Code Ann. §11-35-1530 (1976).

The Panel finds that the Quality Assurance Standards were properly referenced in the Request for Proposal, were properly included as part of the evaluation process and were properly applied by HHS to CCDC. The Panel notes that CCDC should have been aware of the Quality Assurance Standards when the Request for Proposals was issued on June 3, 1988 and any protest of their being included in the criteria for this procurement not made within ten days from that date is untimely.

CCDC points to several other areas in which it claims it was underrated. In particular, CCDC spent a good part of its case

discussing the letters from landlords confirming the availability of space for day-care. (Record, pp. 202, 205, 208, and 211). CCDC claims that all the letters, which are found in Concern Parents' proposal, apply equally to CCDC and it should not have received reduced scores for lacking the letters. (Record, pp. 221-222, 224, 226-227).

The Panel finds that all the letters were submitted by Concern Parent as part of their proposal and were not in HHS' prior possession. If CCDC intended to rely on these letters it should have included them in its proposal or at least somehow referenced them. In any event, it appears to the Panel that only the letter from the Mayor of Loris applies equally to CCDC. (Record, pg. 208). The total number of points deducted because of the absence of a Loris letter would not have changed the outcome in this case and, assuming HHS should have given CCDC credit for the Loris letter, the error was harmless. The rest of the issues raised by CCDC are without merit.

For the reasons stated above, the Panel affirms the August 26, 1988 decision of the CPO.

IT IS SO ORDERED.

SOUTH CAROLINA PROCUREMENT REVIEW PANEL
BY: _____
Hugh K. Leatherman, Sr.
Chairman

October 12, 1988
Columbia, South Carolina

STATE OF SOUTH CAROLINA)	BEFORE THE SOUTH CAROLINA
)	PROCUREMENT REVIEW PANEL
COUNTY OF RICHLAND)	CASE NO. 1988-12
IN RE:)	
PROTEST OF POLAROID)	O R D E R
CORPORATION)	
)	

This case came before the South Carolina Procurement Review Panel ("Panel") for hearing on October 19, 1988, on the protest of Polaroid Corporation ("Polaroid") of the intent to award a contract to National Business Systems Imaging Company, Inc. ("NBS") to provide laminated colored photographic drivers' licenses to the South Carolina Department of Highways and Public Transportation ("Highway Department"). Present at the hearing were Polaroid, represented by Dwight F. Drake and Robert W. Foster, Jr., of Nelson Mullins Riley & Scarborough and Kevin E. McBride of Kirkland & Ellis; NBS, represented by Robert Coble of Nexson Pruet Jacobs & Pollard and Tuck Hopkins of Gallucci, Hopkins & Theisen; Division of General Services, Materials Management Office ("MMO"), represented by J. Patrick Hudson of the South Carolina Attorney General's Office; and, the Highway Department, represented by its General Counsel, Victor S. Evans, Esquire.

Based on the evidence and testimony presented to it, the Panel makes the following Findings of Fact and Conclusions of Law.

FACTS

On June 3, 1988, MMO issued a Request for Proposals to provide laminated colored photographic drivers' licenses to

the Highway Department for a period of one year. (Record, p. 62). The proposals were to be on a "cost per completed license" basis and were to include the cost of furnishing at least 110 cameras, film, laminating equipment and supplies and a negative file with an instant retrieval system. The cost per completed license also included the costs of set-up, training, service, maintenance, shipping and mailing. The contract was renewable for four one-year periods at the option of the Highway Department.

In response to its Request, MMO received two proposals - one from Polaroid and one from NBS (the present provider of the services solicited). Polaroid proposed to furnish the services for $ .596 per license, while NBS' proposal came to $ .6137 per license. The difference based on the estimated number of licenses for the duration of the contract (including optional extensions) is $57,464.

The procedure for evaluating the proposals was twofold. First, MMO determined that each offerer met the technical requirements of the Request and that each offerer was financially responsible. MMO also calculated the point value to be assigned each offerer based on relative cost.[1] MMO then turned the proposals over to a team of three evaluators for further rating according to the criteria set

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1. The formula used was Proposal Cost Being Evaluated divided by Lowest Price Offered X Maximum Points Available (25).

forth in the Request. Those criteria in order of importance were as follows:

A. Cost (Supplied by MMO)

B. Compliance with Technical Specifications
   1. Required System
   2. Optics
   3. Exposure Control
   4. Lighting
   5. Film Loading
   6. Camera Mechanism
   7. Operational Features
   8. Finished License Description
   9. Film
   10. Negative Film
   11. Training and Maintenance

C. Quality of License (based on samples submitted)
   1. Size
   2. Legibility - Clarity
   3. Color
   4. Lamination

D. Demonstrated Capability to Provide Functional Requirements
   1. Completed drivers' license price including all associated costs;
   2. Remakes of Drivers' Licenses
   3. Number and Distribution of Camera Systems
   4. Method of Accounting (Payments)
   5. Camera System Demonstration

E. Organizational/Key Personnel Qualifications - Current and Previous Experience in Related Projects of Comparable Scope
   1. Recent Relevant Experience
   2. Prior Work which allows the contractor to be abreast of current developments
   3. Emphasis which management places on this effort - specifically its ability to commit staff
   4. Identity and Qualification of Staff committed to contract

F. Camera System Set Up and Operational by October 1

(Record, pp. 76-77).

The evaluation team consisted of three experienced employees of the Highway Department: Thomas R. Easler,

Driver Services Administrator, Fred Sojourner, Assistant Director of Motor Vehicles Division and F. D. McCarty, Motor Vehicles Division Field Administrator. Each judge performed an independent evaluation of each proposal except that the judges met to view and perform security tests on the sample licenses submitted.

The proposals were rated by the three judges as follows:

POLAROID

Category(Total Points Available)	Easler	McCarty	Sojourner
Cost (25)	25	25	25
Compliance w/Technical Specs (20)	20	18	18
Quality of Samples (15)	14	15	14
Capability to Provide Functional Requirements (15)	14	14	15
Organization/ Personnel Qualifi-cations (15)	14	12	14
System Set Up and Operational by Deadline (10)	10	10	10
TOTAL	97	94	96

NBS IMAGING SYSTEMS, INC.

Category(Total Points Available)	Easler	McCarty	Sojourner
Cost (25)	24.3	24.3	24.3

Compliance w/Technical Specs (20)	20	20	19
Quality of Samples (15)	15	15	15
Capability to Provide Functional Requirements (15)	15	15	15
Organization/ Personnel Qualifi-cations (15)	15	15	15
System Set Up and Operational by Deadline (10)	10	10	10
TOTAL	99.3	99.3	98.3

(Record, pp. 260-265).

Based on the total average points awarded by the judges, MMO decided to award the contract to NBS Imaging Systems. Polaroid protests the decision to award on a number of grounds.

First, Polaroid claims that because cost was the primary factor and its price was the lowest, Polaroid's proposal should have received more favorable consideration than it did. Polaroid argues that only a .7 point mathematical difference was assigned the approximate $12,500 difference in cost between the two proposals; yet as much as a 3 point subjective difference was assigned in categories ranking very low in order of importance. Polaroid urges that a proper evaluation would have factored cost into all

cost into all the categories.[2]

NBS argues that the completed license cost is not the only cost involved and calls the Panel's attention to the cost of replacing the insert plate, which is required every time a change in Highway Department personnel necessitates a change in the signatures on a license. NBS presented evidence that over the last five years the insert plate was replaced five times. NBS claims that, if the cost of the insert plate is factored in, its bid is nearly the same as Polaroid's.

Polaroid further argues that its proposal offers superior economic value to the State because Polaroid proposes to provide new equipment that is smaller, lighter, safer, more efficient and more secure than NBS'. In particular, Polaroid claims:

a. It intends to provide newly manufactured equipment while NBS proposes to "rehabilitate" the old equipment it already has in place at the Highway Department. Polaroid presented testimony that it will specially manufacture the equipment needed to fill the contract at issue. The manufacturing process will take at least four months.

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2. For example, Polaroid claims that the correct way to view the 3 point rating difference in the Organization and Personnel category in Mr. McCarty's evaluation is, "If a $12,500 difference is worth .7 points, then is Polaroid's Organization and Personnel deficiency $39,000 (3 points) worse than NBS'?"

NBS presented testimony that it intends to use the equipment currently in place. According to NBS, these cameras are no older than seven to eight years while the developers are no older than two years. NBS further contends that it modernizes its equipment in place to reflect advances in its technology.

b. Polaroid proposes to provide 121 cameras, 11 more than required, to insure that there are always backup cameras available. NBS counters that it is necessary for Polaroid to provide these backup cameras because Polaroid has no in-state personnel to repair and service its equipment. NBS offered evidence that its in-state employees repaired or replaced malfunctioning equipment usually within several hours of a reported breakdown.[3]

c. Polaroid's system is safer because it does not involve a process that uses caustic chemicals which are susceptible to spilling and potentially endangering users. According to Polaroid, NBS' process does. Although the parties offered conflicting testimony on the alleged hazards of NBS' process, it is undisputed that NBS' system requires the introduction of liquid chemicals (including bleach containing sulfuric acid) from sealed bottles into a

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3. Polaroid offered the testimony of Beth Grant, an employee of the Highway Department in its Lexington County Office, that on at least one occasion broken equipment was not repaired or replaced by NBS until the following day.

developer component into which film is fed through a series of rollers. The changing of chemicals takes approximately five to ten minutes and is performed by Highway Department personnel. NBS offered evidence that, when used and handled properly, the chemicals do not leak or spill in quantity.

Polaroid's system works in approximately the same manner as the familiar system offered for sale directly to consumers, i.e., the developing process is accomplished in the film component, which when peeled apart after the requisite time reveals the photograph. The gel chemical containing portion of the film is discarded.

d. Polaroid's system has only one component, making it lighter, smaller and more portable than NBS'. Polaroid's system consists of a camera and weighs 55 pounds. NBS' system contains a camera and a developer and weighs 140 pounds. Both systems require a laminator to make finished licenses.

e. Polaroid's system can deliver licenses in about two and one-half minutes while NBS' takes at least five minutes. Polaroid's system also needs no warm-up time other than five minutes for the laminator, while NBS' takes approximately twenty minutes. NBS does not dispute that Polaroid's system is faster than its own. It argues that the Request For Proposals only requires license production in five minutes or less, which it meets. Polaroid, however, offers a study performed by an industrial engineer at its

request which purports to show that NBS' system delivers licenses in an average of 5 minutes, 15 to 53 seconds.

f. Polaroid contends that the licenses produced by it are more secure than NBS' licenses.[4] Polaroid's personnel testified that its use of a camera number plus its lip seal method of laminating a license by chemically fusing the photograph into the plastic rendered its license more resistant to tampering than NBS'. Agent Michael L. Nelson of the Alcoholic Beverage Control Commission stated that, in his opinion, the lip seal lamination and the gold strip lettering of the words "South Carolina" over the birth date area make Polaroid's license more secure from alteration than NBS'.

NBS, on the other hand, offered evidence that its license was safer from counterfeiting (as distinguished from alteration) than Polaroid's because Polaroid's film, cameras, and plates (or usable substitutes) could be purchased over the counter. In contrast, NBS' equipment is for sale only to its government users.

Polaroid also claims that it unfairly received point deductions because it requested the State to perform an

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4. The Request For Proposals required the license to be laminated in "such a manner that when the laminate is removed, the license itself shall be destroyed to the extent that such removal is evident to the naked eye." (Record, p. 71). Further the license was required to incorporate special features so that authenticity and integrity could be verified without special equipment or lengthy examination. (Record, p. 72)

inventory of supplies once a year and because it required the State to assist Polaroid in moving back-up equipment.

As part of its proposal, Polaroid asked the State to help it conduct inventories of film supplies on hand once a year. Polaroid claims that this inventory will take only five to ten minutes per year of one employee of each location plus some time for one central person to collect all the results and forward them to Polaroid. Polaroid asserts that this five to ten minutes per year should have been balanced against the five to ten minutes per week for chemical changing which is required by NBS' present system but not Polaroid's.

Polaroid, unlike NBS, also indicated that the State would be required to assist it in moving back-up equipment in case of breakdown. Polaroid contends that because its system is more reliable than NBS', this request is not unreasonable. Polaroid offered evidence that NBS' maintenance and breakdown problems are overwhelmingly with the developer rather than the camera component. Polaroid's system has no developer.

Polaroid makes a similar argument concerning the large deductions it received in the Maintenance and Personnel categories for the absence of in-state employees assigned to the contract. NBS offered evidence that it has six full time employees in South Carolina, five of whom travel the state making service and repair calls. In contrast, Polaroid offered only a toll free telephone number in its

proposal as a contact in case of breakdown. Polaroid did offer the name of an out-of-state individual as overall manager of the project. (Record, p. 138). At the hearing Polaroid presented evidence that it would handle breakdowns by shipping backup equipment by UPS or similar services within two hours of a breakdown.

In addition to arguing the merits of its own proposal, Polaroid argues that NBS' proposal is not responsive because the specifications require, "All equipment must be U.L. listed or certified to meet Underwriters Laboratory standards." (Record, p. 56). Polaroid states that its equipment will be U.L. listed. NBS' equipment is not listed and it states only that its equipment was "purchased, designed, and built to meet the requirements" of Underwriters' Laboratory. Polaroid contends that NBS' certification is insufficient to meet the specification because it is signed by Jack L. Craven, Vice-President for NBS. William W. Wilson, an independent certification consultant formerly employed by Polaroid, testified that, in his opinion based on industry standards, the certification requirement of the Request For Proposals can be met only by third party certification by a qualified professional such as an engineer and that a statement from NBS' vice-president is inadequate.

William Doug Horton, the Procurement Specialist responsible for the Request For Proposals at issue, testified the Underwriters Laboratory certification

requirement evolved through a series of amendments designed so that both offerers could meet it, thus insuring competition. Mr. Horton testified that the Request requires only that someone certify that the equipment offered meets U. L. standards. In his opinion, NBS met the certification requirement.

Finally, Polaroid claims that NBS is not a responsible bidder because NBS' parent company, National Business Systems, Inc., is allegedly experiencing legal and financial difficulty. Polaroid offered as evidence a Securities and Exchange Commission Form Q-10 report which indicates that National Business Systems' "ability to continue operations as a going concern and to realize its assets and discharge its liabilities in the normal course of business is dependent upon the successful completion of current discussions with its lenders regarding its bank and other debt and its ability to reorganize its capital structure . . . ." (Pltf.'s Ex. 1, p. 8). NBS does not dispute the SEC information, but argues that it has the financial capability to perform the contract and that the requirement of a $100,000 bond adequately protects the State. (Record, p. 75). Although it produced only a $25,000 bond at the hearing before the Panel (apparently as a result of a mistake), NBS offered testimony that it was prepared to post the required $100,000 bond. Mr. Horton testified that posting the full bond is a condition precedent to NBS' obtaining the contract.

CONCLUSIONS OF LAW

The bidding device used to solicit bidders on the contract in question was a Request For Proposals ("RFP") as set forth in S.C. Code Ann. § 11-35-1530 (1976). A RFP differs from an invitation for competitive sealed bids in that a RFP is evaluated using a number of criteria only one of which is price.

Although a RFP by its nature requires some subjective evaluation, the Procurement Code sets some boundaries on the evaluator's exercise of judgment by providing:

> The request for proposals shall state the relative importance of price and of each other evaluation factor . . . .
>
> * * *
>
> No other factors or criteria shall be used in evaluation and there shall be adherence to any weightings specified for each factor in the request for proposals.

§11-35-1530(5),(7)(1976 and 1987 Cum. Supp.) As with any duty or act performed pursuant to the Procurement Code, the evaluation of proposals must be done in good faith with observance of reasonable standards of fair dealing. §11-35-30. Therefore, each proposal must receive fair and equal consideration by the State.

In this case, the RFP set forth six factors, with numerous subcategories, against which each proposal was to be evaluated. Polaroid raises questions about the grading

in five of these categories.[5] The Panel finds that Polaroid's proposal was not fairly and equally considered in at least some of the categories.[6]

In the category "Compliance With Technical Specifications," which is second only to cost in importance, Polaroid is unquestionably superior to NBS in a number of subcategories. NBS does not dispute that Polaroid's system consists of only one component, weighs about one-third as much as NBS', requires only five minutes warm-up time, and delivers licenses twice as fast as NBS'. Yet in reviewing the scores assigned by the evaluators and in listening to their testimony, it is apparent to the Panel that Polaroid's superiority in these areas was not considered by the evaluators or, if considered, was not credited. For example, both Mr. McCarty and Mr. Easler were apparently unaware that Polaroid delivered licenses twice as fast as NBS. (Tr., p. 55 line 4 - p. 56 line 5; p. 88, lines 16-23). Both assigned NBS a perfect score.

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5. Because both Polaroid and NBS received the maximum number of points in the category "Camera System Set Up and Operational By October 1", this category in not in issue.

6. The parties urged various standards of review on the Panel. MMO argues that the Panel should not reverse the findings of the evaluators absent arbitrary or capricious conduct. The Highway Department argues that the Panel should not substitute its judgment for the findings of the evaluators. Polaroid contends that the hearing before the Panel is de novo and, therefore, the Panel is free to make any findings it chooses. The Panel is not limited as MMO and the Highway Department suggest. S. C. Ann. §11-35-4410(5)(1976). However, that is irrelevant in this case as the Panel finds the error to be that the evaluators failed to consider at all certain aspects of Polaroid's proposal.

Similarly, in the Organization/Personnel Qualifications category, ranked fifth in importance, under subcategories 3 and 4 entitled, "Emphasis which management places on this effort" and "Identity and Qualification of Staff committed to this contract", the evaluators subtracted from one to three points for Polaroid's not having in-state employees and naming only one person as responsible for the account. NBS has six in-state employees and received a perfect score from the evaluators for the entire category.

However, the first two subcategories of this factor are "Recent Relevant Experience" and "Prior Work Which Allows the Contractor to Be Abreast of Current Developments." Although it is plainly stated in Polaroid's proposal (Record, p. 136), at least two of the evaluators testified that they were unaware that Polaroid currently provides drivers' licenses to 29 states (and the District of Columbia) and provides ID's to NASA, the FBI, CIA, National Security Agency, the Secret Service, the Pentagon, both Houses of Congress and the IRS. (Tr., p. 60, lines 1-22 (McCarty; p. 88, lines 16-23 (Easler)). Apparently NBS currently serves only a third as many states including South Carolina. It is obvious from the testimony that this potentially favorable information set forth in Polaroid's proposal was not considered by the evaluators.

A final example is in the category "Quality of License." Evaluator Easler testified that at the time he evaluated the proposals, he believed that NBS' license had

larger letters and numerals. Mr. Easler admitted at the hearing before the Panel that he now believes that Polaroid's lettering is equal or larger in size than NBS'.

In summary, the Panel concludes that Polaroid's proposal did not receive adequate consideration from the evaluators. For that reason, the Panel finds that the contract in question should be rebid.

To aid MMO in rebidding the contract, the Panel makes these further findings. Polaroid claims that it should have received more credit for having the lowest cost because cost is the most important factor. Cost in this case was evaluated using a standard mathematical formula. The Panel can find nothing unfair or unreasonable in crediting each proposal for its price in this objective way and rejects Polaroid's argument in this regard.

The Panel also rejects Polaroid's argument that NBS' proposal is not responsive to the Underwriter's Laboratory certification. MMO commendably drafted the RFP in this case to encourage competition. Mr. Horton testified that NBS met the intent of the U. L. certification requirement by submitting the certification of its vice-president. The Panel accepts Mr. Horton's interpretation of the RFP.

The Panel also upholds MMO's determination that NBS is a responsible bidder. The Panel finds that the requirement of a $100,000 performance bond adequately protects the State in this case. In this regard, the Panel notes that it is

proper for the State to consider NBS' performance under past contracts to determine responsibility.[7]

Finally the Panel directs the parties' attention to category D(5), which calls for an evaluation based on a "camera system demonstration." Apparently no such demonstration was performed for the evaluators although at least one of them testified that he could not recall whether he had ever seen Polaroid's camera in operation. (Tr., p. 56, lines 4-5 (McCarty)). In situations such as this where there are a minimal number of offerers one of which has had the contract being let for a number of years, the Panel believes that it would be beneficial to the State and fairer to the offerers if the evaluators had the opportunity to view the operation of both systems.

It is therefore ordered that the contract in question be rebid, that MMO shall have the authority to amend or revise the RFP in any manner it deems necessary and that each offerer be allowed to submit its best and final proposal. The proposals submitted shall be carefully

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7. S. C. Code Ann. § 11-35-1810 requires the State to determine the responsibility of a bidder prior to the contract being let. Responsibility is determined with reference to the following factors: the financial and physical ability of the bidder to meet all contractual requirements, past performance, past record of integrity, legal qualification to contract with the State, and bidder's cooperation in supplying all information requested concerning responsibility. Reg. 19-445.2125.

examined and all aspects of each proposal shall be considered. The September 12, 1988, order of the Chief Procurement Officer is hereby reversed.

IT IS SO ORDERED.

South Carolina Procurement
Review Panel

By: _____
Hugh K. Leatherman, Sr.
Chairman

11-7-88, 1988
Columbia, South Carolina

STATE OF SOUTH CAROLINA	)	BEFORE THE SOUTH CAROLINA PROCUREMENT REVIEW PANEL
	)	
COUNTY OF RICHLAND	)	CASE NO. 1988-13

IN RE:	)	
	)	
PROTEST OF OAKLAND JANITORIAL SERVICE, INC.	)	O R D E R
	)	

This case came before the South Carolina Procurement Review Panel ("Panel") on the protest of Oakland Janitorial Service, Inc. ("Oakland") of its disqualification from being awarded a contract for the provision of custodial services to the Department of Highways and Public Transportation ("Highway Department"). Present at the hearing before the Panel were Oakland, represented by M.M. Weinberg, III, Esq., of Weinberg Brown & McDougall; the Division of General Services, Materials Management Office ("MMO") represented by J. Patrick Hudson, Esq. and Alice Broadwater, Esq., of the South Carolina Attorney General's Office; and the Highway Department, represented by its General Counsel Victor S. Evans, Esquire.

Because of its holding in this case, the Panel accepted no evidence from MMO or the Highway Department. Therefore, the following statement of facts is derived from evidence elicited solely during the protestant's case.

FACTS

On May 3, 1988, MMO issued a bid solicitation for janitorial services for the Highway Department for one year beginning July 1, 1988. The bid solicitation required each bidder to list three references. The protestant Oakland

Janitorial Service submitted its bid with references on or around May 17, 1988.

On August 16, 1988, Oakland attended a thirty to forty-five minute meeting held at MMO's offices in Columbia. Abraham Alston, President of Oakland, and Johnnie Mae Gist, its Vice-president, represented Oakland at the meeting; Joe Fraley, Jim Culbreath, and Jim Bokanovich were present for MMO. According to Ms. Gist, Mr. Culbreath began the discussion by advising her and Mr. Alston that Oakland was not going to get the Highway Department contract. Ms. Gist testified that when Mr. Alston asked the reason, Mr. Culbreath replied that Oakland had received bad references, implying that McEntire Air National Guard Base was one of them. Mr. Alston stated that he was told that the bad references were from Charleston Air Force Base and, he thought, Williams Air Force Base.

Mr. Alston testified that even though it was clear to him that Oakland was not going to get the contract, he could not believe it because Oakland had used the same references to apply for an earlier larger contract which Oakland had won. According to Mr. Alston, Oakland had done no work for its references between the two contracts to account for the apparent change in their recommendations.

Although she asked, Ms. Gist did not receive copies of the bad references at that time or at any time prior to the hearing before the CPO. Ms. Gist acknowledges that the letter dated August 16, 1988 (Record, p. 50) was

hand-delivered at the meeting, however she does not remember the written determination of nonresponsibility (Record, p. 51) being attached. In any event, Ms. Gist admits that Oakland received the written determination by mail about a week after the August 16 meeting.

Mr. Alston testified that, some time after the August 16 meeting, he mentioned to Clarence Davis, an attorney retained by Oakland on an unrelated matter, that Oakland had been disqualified from obtaining a state contract and that he (Mr. Alston) could not believe it. Mr. Davis said that he would call MMO and find out about it. According to Mr. Alston, Davis never talked with him again about the Highway Department contract, however Mr. Culbreath told him that Davis had called MMO.

Ms. Gist, on the other hand, testified that Mr. Alston told her that he had talked with Mr. Davis and that Davis had called Joe Fraley who told him that Oakland was not going to get the Highway Department contract because of bad references. Ms. Gist remembered that this conversation took place about three to five days after the August 16 meeting. Ms. Gist herself never talked to Davis about the contract.

The Notice of Intent to Award the contract to Commercial Maintenance Service was issued on August 25, 1988, with the contract to become effective on September 12, 1988. (Record, p. 49). Although she does not remember when, Ms. Gist acknowledges that Oakland received the Notice of Intent to Award.

According to Ms. Gist, about a week to ten days after the August 16 meeting, Mr. Alston attempted to get in touch with state Senator Phil Leventis and left word with his office. Mr. Alston testified that Sen. Leventis returned his call some time later and that, after Alston explained his problem, Sen. Leventis told him he would talk to someone and get back to Alston. Sen. Leventis eventually advised Alston that Oakland had the right to protest and that it should retain counsel to help it.[1]

Ms. Gist testified that, on or about September 9, Mr. Alston told her to call MMO to see what needed to be done to protest. Ms. Gist stated that she called Joe Fraley on Friday, September 9, and asked about the deadline for the right to protest. According to her, Mr. Fraley stated that he would have to look at the records. When he returned to the phone he stated that Oakland had until September 12, the following Monday, to protest. Ms. Gist testified that she sent Oakland's letter of protest (Record, p. 47) to Federal Express that day and received a guarantee that it would be delivered on Monday, September 12. The parties agree that the letter was received that Monday.

Mr. Alston stated that he entrusted the review and interpretation of contract and bid solicitation documents to Ms. Gist. Ms. Gist testified that although she has no legal

1. Despite Senator Leventis' advice, Oakland did not retain counsel to assist it in this case until September 23, four days prior to the hearing before the Chief Procurement Officer.

training she believes that she understands the bidding process. Ms. Gist stated that, while she did not know about the ten day period to file protests, she did realize that there was probably a deadline, maybe thirty days. According to her, she understood that Oakland could not just let the matter go indefinitely.

Under questioning by the Panel, Ms. Gist admitted that, although she had read the bid solicitation documents, she did not remember Instructions to Bidders number 12, which provides:

> Any vendor desiring to exercise rights under Section 11-35-4210 (Right to Protest) of the South Carolina Consolidated Procurement Code should direct all correspondence to Chief Procurement Officer, Division of General Services, 1201 Main Street, Suite 600, Columbia, S. C. 29201.

(Record, p. 29). Ms. Gist testified that she now understands what procedure Oakland should have followed.

Issues

Oakland makes two arguments in the alternative. First Oakland argues that it did not receive the names of the references that were the reason for determination of nonresponsibility until the first hearing on September 27, 1988, and, therefore, did not have sufficient information to appeal until then. In the alternative, Oakland contends that, because Mr. Fraley at MMO told it that it had until September 12 (the effective date of the contract) to protest, MMO should be estopped to assert timeliness now.

Section 11-35-4210 of the Procurement Code provides:

> Any actual or prospective bidder . . . who is aggrieved in connection with the solicitation or award of a contract may protest . . . . The protest, setting forth the grievance, shall be submitted in writing within ten days after such aggrieved persons know or should have known of the facts giving rise thereto, but in no circumstance after thirty days of notification of award of contract.

The Panel has held in the past that a protestant does not need to know every minute fact involved in his protest in order to start the ten-day time limit running; it is enough that a party have reasons sufficient to support a protest. In Re: Protest of Computerland of Columbia, Case No. 1988-4.

In the Computerland case, Computerland had attended the bid opening and knew it was the apparent low bidder. Through independent research it had learned that its competitor could not qualify for the South Carolina preference. On March 4, it received the Notice of Intent to Award indicating that it did not have the contract. Computerland did not protest until March 16. Computerland argued that it had requested and was awaiting information on how the bids were evaluated before it protested. The Panel found that Computerland possessed enough information to file a protest on the date it received the Notice of Intent to Award.

The Panel has also held that a protest is not to be judged by highly technical or formal standards, it is enough that it in some way alert the parties to the general nature

of the grounds for protest. In Re: Protest of Sterile Services Corp., Case No. 1983-17.

In this case, both Ms. Gist and Mr. Alston testified that it was clear to them on August 16th that Oakland was not going to get the contract. Mr. Alston testified that on August 16 he was told that the bad references were Charleston Air Force Base and, he believes, Williams Air Force Base. Mr. Alston further testified that at that time he could not believe any of the references were bad because Oakland had gotten another contract using these same references.

While it is undisputed that Oakland did not receive copies of the references until the hearing before the CPO, this information was not essential for Oakland to raise the ultimate issue of its protest.[2] Indeed Oakland's September 9th protest letter prepared without benefit of copies of the references more than adequately puts in issue the question whether Oakland "is quite capable of performing the duties outlined in the contract." (Record, p. 47). The Panel finds that Oakland knew or should have known on August 16 of facts sufficient to state a protest. Therefore, Oakland's protest was due on or before August 26. Because it was not received until September 12, Oakland's protest was untimely.

Oakland's second argument is that MMO should be estopped to assert the ten-day limit because Mr. Fraley

2. The failure of the State to provide this information timely upon request may have been cause to postpone the hearing before the CPO.

advised Oakland that it had until September 12 to file a protest. Oakland's argument raises an issue of first impression for the Panel - whether the ten-day period for filing protests set forth in section 11-35-4210 should be considered an absolute bar or whether it may be waived by the consent or conduct of the parties.

Generally, in the absence of statutory language to the contrary, perfection of a review proceeding within the time limited by statute or rule is jurisdictional. Where the appeal is not taken within the time provided, jurisdiction cannot be conferred by consent or by waiver. See, 4 Am. Jr. 2d, Appeal and Error, 292. The South Carolina Supreme Court has long considered its ten-day period for filing a Notice of Intent to Appeal jurisdictional because "it is important to the administration of justice that there be no uncertainty" about when a matter has come to an end. Palmer v. Simons, 107 S.C. 93, 92 S.E. 23 (1917). The Supreme Court recently affirmed its holding that the ten-day period is jurisdictional even though the statute upon which the rule is based was repealed. Mears v. Mears, 287 S.C. 168, 337 S.E.2d 206 (1985).

The ten-day period for filing protests of the decisions of the state in procurement matters set forth in section 11-35-4210 is unconditional. There are no qualifying words such as "except for good cause shown." The Panel believes that it is essential to the operation of the government that challenges to its purchasing decisions be limited. If the

time for filing protests can be waived, the State will be unable to determine with certainty when it can enter into a contract with one vendor for vital goods and services without the danger of being liable to another vendor.

The Panel believes that in approving section 11-35-4210 as written the General Assembly recognized that, despite the hardship which might occasionally arise from strict application of the time period, on balance the public is better served if there are definite limits to the right to challenge state procurement decisions. For these reasons, the Panel finds that the time for filing protests set forth in section 11-35-4210 is jurisdictional and may not be waived by conduct or consent of the parties.[3]

Although its holding does not require it, the Panel additionally finds that, even if the filing period were not jurisdictional, Oakland has not shown that MMO should be estopped from asserting the time limitation. In Freeman v.

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3. The Panel finds that the thirty-day limit is not applicable in this case but under the reasoning advanced above it must also be considered jurisdictional. The purpose of the thirty-day limit is to shorten the ten-day limit for persons learning of facts giving rise to a protest after the award. In In Re: Protest of American Telephone & Telegraph Company, Case No. 1983-12, the Panel explained, "Thus, for example, if a person learns of facts giving rise to a protest twenty-one days after the award, that person would have nine days (the remainder of the thirty-day period), rather than ten days to file his protest.

Fisher, 341 S.E.2d 136 (1986), the South Carolina Supreme Court summarized the defense of estoppel as follows:

> To successfully assert the defense of estoppel, one must show that he was without knowledge, or any means of knowledge, of facts upon which he predicates a claim of estoppel. . . . Respondent's counsel could have discovered his erroneous construction of the statute by simply reading the plain language of the statute. The failure of one party to call to the attention of another party a fact equally within the knowledge of both forms no basis for an estoppel. . . Moreover, estoppel may not be invoked to nullify a mandatory statutory restriction. . . . A party cannot claim reasonable reliance on a representation by another in the face of a clear statutory mandate.

(Emphasis added). 341 S.E.2d, at 137. In the Freeman case, the respondent argued that plaintiff should be estopped to assert the ninety-day limitation on applying for an appraisal of property in a foreclosure action because plaintiff's counsel failed to correct respondent's counsel when he misstated the law in his presence.

Further in Lovell v. C. A. Timbes, Inc., 263 S.C. 384, 210 S.E.2d 610 (1974), the Supreme Court noted that ignorance of the requirement of filing within a certain time is no legal excuse for failure to file within the time.

In the present case, as in Freeman, the mandatory time for filing is set forth plainly for anyone who chooses to read it. Further, in this case the bid instructions reference the appropriate section of the Procurement Code and refer a party wishing to exercise the right to protest to the Chief Procurement Officer. The evidence also shows

that if Oakland was confused about its rights it had access to counsel before the time period ran. Finally, the Panel notes that the ten-day period had already run before Oakland even made its inquiry concerning the time limit and allegedly received the misleading information. The Panel holds that Oakland cannot claim estoppel under the holdings in the Freeman and Lovell cases.

For the reasons set forth above, the Panel finds that the protest of Oakland Janitorial Service, Inc. is untimely and affirms the October 3, 1988 order of the Chief Procurement Officer.

IT IS SO ORDERED.

South Carolina Procurement
Review Panel

By: Hugh K. Leatherman
Hugh K. Leatherman, Sr.
Chairman

11-17-88, 1988
Columbia, South Carolina

STATE OF SOUTH CAROLINA)
)
COUNTY OF RICHLAND)

BEFORE THE SOUTH CAROLINA PROCUREMENT REVIEW PANEL
CASE NO. 1988-14

IN RE :
PROTEST OF PITNEY BOWES, INC.)

O R D E R

On October 31, 1988, the South Carolina Procurement Review Panel received a protest from Pitney Bowes, Inc., concerning the intent to award a contract for the provision of a mail management system at the College of Charleston. It appears from the material received that this case comes to the Panel without benefit of an initial administrative hearing before the Chief Procurement Officer because Pitney Bowes filed its initial protest with the College of Charleston.

The Panel believes that a hearing before the Chief Procurement Officer on the issues presented will benefit both the parties and the Panel. Therefore, the Panel orders that this case be remanded to the Chief Procurement Officer for hearing on the issues raised by the parties. Appeal from the decision of the Chief Procurement Officer will be as provided in the Procurement Code, S. C. Code Ann. §§11-35-4210 and -4410 (1976).

IT IS SO ORDERED.

SOUTH CAROLINA PROCUREMENT
REVIEW PANEL

BY: _____
Hugh K. Leatherman, Sr.
Chairman

11-7-88, 1988
Columbia, South Carolina

STATE OF SOUTH CAROLINA)
)
COUNTY OF RICHLAND)

BEFORE THE SOUTH CAROLINA PROCUREMENT REVIEW PANEL
CASE NO. 1988-14

IN RE :)
PROTEST OF PITNEY BOWES, INC.) O R D E R
)

This case came before the South Carolina Procurement Review Panel ("Panel") for hearing on January 5, 1989, on the protest by Pitney Bowes, Inc., ("Pitney Bowes") of the award to Major Business Machines, Inc., of a contract to provide a mail management system to the College of Charleston (the "College").

Present at the hearing before the Panel were Pitney Bowes, represented by Daniel Marino, Esq., of Seyfarth Shaw Fairweather and Geraldson and Robert Knowlton, Esq., of Sinkler & Boyd; the College of Charleston, represented by J. Patrick Hudson, Esq., of the South Carolina Attorney General's Office; and the Division of General Services, represented by Helen Ziegler, Esquire. Major Business Machines was present but not represented by counsel.

FACTS

On August 5, 1988, the College of Charleston issued an invitation for bids to provide a mail management system to service all its departments and personnel. The bid specifications provided in pertinent part:

LOT A

#1 Mail Machine with Seventy (70) Pound Electronic Scale that will:

* * *

D. Use Ink reservoir system.

* * *

#2 Mail Accounting System, both Hardware and Software, which will:

* * *

D. Generate daily, weekly, monthly, and yearly transaction and summary reports (dollar volume and piece count). Reports must note postal class, department accounts, and amounts.

(Record, p. 50).

The College received two bids which were opened on September 5, 1988. The protestant Pitney Bowes bid $29,203.25 to provide a system manufactured by it; Major Business Machines bid to provide a Friden Alcatel system for $17,331.00. (Record, p. 56). The College determined that Major Business Machines was the lowest responsive and responsible bidder and issued the Intent to Award on October 12, 1988. (Record, p. 115).

On October 13, 1988, Pitney Bowes protested to the Director of Procurement for the College, David Sadler. (Record, p. 17). Mr. Sadler denied the protest on October 20 (Record, p. 114) and Pitney Bowes appealed to the Panel on October 28. (Record, p. 12-15).

By Order dated November 7, 1988, the Panel remanded the case to the CPO for hearing which was held on November 23,

1988.[1] The CPO issued his decision in favor of the College on December 7, 1988, and Pitney Bowes again appealed to the Panel on December 15, 1988.

Pitney Bowes claims that Major Business Machines' bid was not responsive to the specifications in two ways. First, Pitney Bowes claims that the Friden Alcatel machine does not meet the specification that the mailing machine use an "ink reservoir system".

Mr. James Cosby, area sales representative for Pitney Bowes, testified that Pitney Bowes' machine uses what is known as an "ink reservoir" system to deliver ink to the plate which imprints the postal stamp on mail. According to Mr. Cosby, this system is distinct from the type of system used by the Friden Alcatel machine bid by Major. That machine uses what is termed an "ink cartridge" system to deliver ink.

In the ink reservoir system the ink is stored in a well; in the ink cartridge system it is impregnated in the ink pad. To replenish the ink supply in the reservoir system

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[1]The case was remanded because Pitney Bowes directed its protest to the Director of Procurement at the College rather than to the CPO, as is required by S. C. Code Ann. §11-35-4210 (1976). The error was compounded when the College exceeded its authority and undertook to deny the protest. The Panel cautions all agency and state procurement agents of the need to be familiar with all aspects of the Procurement Code, including the proper protest procedures.

one pours ink from a bottle into the well; in the ink cartridge system, one replaces the pad.

Mr. Cosby testified that in the mailing machine industry, the terms "ink reservoir" and "ink cartridge" have specific meanings and are not interchangeable.[2] Mr. Cosby stated that around the same time the bid solicitation was being prepared he demonstrated the differences between the two systems to the College. According to Mr. Cosby, when he saw the term "ink reservoir" in the solicitation, he believed that only the ink well system would meet the bid specification.

In contrast, Mr. Don Major of Major Business Machines testified that there was no industry standard which would prevent Friden from referring to its cartridge system as a "reservoir." Mr. Major testified that he believed that Major Business Machines was in compliance with the bid specifications when it bid the cartridge system.

The College acknowledges that the inking systems of the two machines are different. It argues, however, that it did not intend a technical or industry meaning when it used the term "reservoir." Mr. David Sadler, Director of Procurement for the College, and Mr. Richard Bennett, the Information

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[2]In the record is an excerpt from the publication, What to Buy In Business, Volume 2, Number 10, which compares various mailing systems. That publication distinguishes between the ink reservoir and ink roller or cartridge system. (Record, pp. 43-44).

Technology Buyer, both testified that the College intended "reservoir" to include any system which stored ink. According to Mr. Bennett, the College did not want a machine which used carbon.[3] Mr. Bennett acknowledged that, at the time the solicitation came out, he was aware that Pitney Bowes attached a different meaning to "reservoir" than the College.

The College further argues that, because §11-35-2730 of the Procurement Code prohibits restrictive specifications, the words "ink reservoir" should not be interpreted according to alleged industry standards but so as to allow maximum competition.

Pitney Bowes second argument is that Major Business Machines' bid is not responsive because the Friden mail accounting system cannot produce daily, weekly, monthly and yearly reports as required by the specifications. Pitney Bowes claims that the Friden system has the capability to produce any three of the daily, weekly, monthly and yearly reports. In the record is a letter from Major Business Machines to the College of Charleston, which states:

> Concerning being able to generate basic reports on a daily, weekly, monthly, and yearly with the Friden Mail Accounting System (MAC), the College of Charleston is able to generate reports at any time you choose. With the Friden Mail Accounting System you will be able to clear for three different

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[3]Mr. Bennett testified that he later learned that there are no machines which use a carbon system.

> periods. I recommend you clear these totals daily, monthly, and yearly.

(Emphasis added)(Record, p. 84). Pitney Bowes also points to Friden's sales literature as confirming that Friden can only generate three of the four reports mentioned in the specifications.

Mr. Bennett testified that under the College's interpretation of the specifications it is not a requirement that the four reports be produced simultaneously. Mr. Bennett stated that he considers the Friden Alcatel system capable of meeting the College's needs and the bid requirements as he interprets them. Mr. Sadler supported Mr. Bennett's liberal interpretation of the specifications and testified that, under one possible strict interpretation of the accounting system specifications, neither Pitney Bowes nor Friden could comply.[4] Mr. Major testified that to him a literal reading of the specification did not make sense but that he nevertheless understood what was meant and he believes that Major Business Machines is responsive.

Ron Moore, the Chief Procurement Officer, testified that, in his opinion, Pitney Bowes is not prejudiced even if the specifications are ambiguous because the mailing machine

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[4]The specification requires the generation of "daily, weekly, monthly and yearly transaction and summary reports." (Record, p. 50). The evidence shows that, despite the use of the conjunctive "and", there is no such thing as a daily summary report and a yearly transaction report would be prohibitively large.

bid by Pitney Bowes in this case is the only machine it has that meets all the bid requirements.[5] According to Mr. Moore, whether or not the specifications permit an ink cartridge system and production of only three reports, the additional specification of 190 pieces per minute prohibits Pitney Bowes from offering a machine other than the one bid. However, Mr. Moore testified that he believed that the specifications could be written to meet the College's needs and allow Pitney Bowes to bid another machine.[6]

CONCLUSIONS OF LAW

The Procurement Code requires that "all specifications shall be drafted so as to assure cost effective procurement of the State's actual needs and shall not be unduly restrictive." S. C. Code Ann. §11-35-2730(1976). Reg. 19-445.2140(B) provides:

> The purpose of a specification is to serve as a basis for obtaining a supply, service, or construction item adequate and suitable for the State's needs in a cost effective manner . . . .It is the policy of the State that specifications permit maximum practicable competition consistent with this purpose. Specifications shall be drafted with the

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[5] The Panel is not persuaded that Pitney Bowes is not prejudiced by the ambiguity of the specifications. It is a fact of competitive bidding that vendors price their products, not simply at "rock bottom", but in relation to what they believe is being bid by the other offerors.

[6] Apparently Pitney Bowes has a smaller machine which can handle 185 pieces per minute. It is unclear whether this smaller machine is compatible with the required accounting system.

> objective of clearly describing the State's requirements. All specifications shall be written in a non-restrictive manner as to describe the requirements to be met.

The Panel agrees with the College that specifications should be written to allow as many vendors as possible to participate in a solicitation. That, however, is a different question from how a specification should be interpreted. The Panel has held that when a specification is of uncertain meaning and can reasonably be interpreted in more than one way, it is ambiguous. When a specification is ambiguous it is proper to rebid the contract. In re: Protest of Warehouse Distributing Company, 1988-2.

In this case there is ample evidence to support Pitney Bowes assertion that the term "ink reservoir" has a specific meaning, not just to Pitney Bowes, but within the mailing machine industry. Pitney Bowes does not need to prove that the term is an industry standard set by an organization like Underwriter's Laboratory. It is enough that Pitney Bowes show that its interpretation of the term "ink reservoir" was reasonable.

The College has also shown that it reasonably attached a different meaning to "ink reservoir." Both Mr. Bennett and Mr. Sadler testified that when the College used the term it did not intend for it to be interpreted technically. According to both gentlemen, they consulted the dictionary and assured themselves that the term "reservoir" was appropriate for the College's needs using the general dictionary definition. Both Mr. Sadler and Mr. Bennett

stated that they were not experts in the mailing machine industry and were unaware of any standard regarding use of the term "reservoir."[7] Finally, Mr. Major testified that there was no legal prohibition on Major's referring to the Friden cartridge as a "reservoir" system.

The Panel finds that the term "ink reservoir system" as used in the bid solicitation in question is ambiguous.

The Panel also finds that the accounting system specification can reasonably be interpreted in more than one way. Mr. Major and Mr. Sadler both testified that no vendor could comply with a literal interpretation of the specification. The solicitation requires the generation of "daily, weekly, monthly, and yearly" reports. Pitney Bowes can generate all four reports simultaneously and interpreted the specification to require that. The College testified that it only needs a daily plus two other types of reports at any one time and it interpreted the specification to allow that.

The Panel finds that, because both the inking system and accounting system specifications are ambiguous, the proper remedy in this case is to rewrite the specifications to remove the ambiguity and rebid the contract. The Panel also advises the College of Charleston to consult with its

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[7]Regrettably the College procurement office did not consult the end user (its mail room) or state procurement concerning the term.

mail room and with state procurement and to review all of the specifications involved in this solicitation to insure that they accurately reflect the needs of the College. To the extent that some specifications may reflect more than is needed, eg., the pieces per minute requirement, those specifications should be revised.

Wherefore, the Panel orders that the December 7, 1988 decision of the CPO be reversed and the contract in question be rebid.

IT IS SO ORDERED.

SOUTH CAROLINA PROCUREMENT
REVIEW PANEL

BY: _____
Hugh K. Leatherman, Sr.
Chairman

January 19, 1989
Columbia, South Carolina

STATE OF SOUTH CAROLINA	)	BEFORE THE SOUTH CAROLINA PROCUREMENT REVIEW PANEL
	)	
COUNTY OF RICHLAND	)	CASE NO. 1988-14

IN RE:
PROTEST OF PITNEY BOWES, INC.) O R D E R

This case originally came before the South Carolina Procurement Review Panel ("Panel") for hearing on January 5, 1989, on the protest by Pitney Bowes, Inc., ("Pitney Bowes") of the award to Major Business Machines, Inc., ("Major") of a contract to provide a mail management system to the College of Charleston (the "College"). In its Order dated January 19, 1989, the Panel found in favor of Pitney Bowes that the specifications were ambiguous and ordered the College of Charleston to rewrite the specifications and rebid the contract.

On January 31, 1989, the College of Charleston petitioned the Panel for rehearing of the case on the grounds that, if the contract is rebid as ordered, the College could potentially suffer excessive damages because, before the Pitney Bowes protest, it had already contracted with Major to provide the mail management system. The College alleges that if the contract is rebid and a vendor besides Major wins, the College might find itself obligated under two contracts.

At the first hearing evidence was presented to the Panel of the existence of the contract with Major. Mr. Major himself testified that his company was still awaiting payment under the contract pending Major's correcting some

problems that the College was experiencing with the postage machine. The College did not present evidence of the terms of the contract or of what its potential liability would be upon termination. Neither did it argue the existence of the contract as a factor against rebidding although this relief was plainly requested and argued for by Pitney Bowes.

In the absence of a showing by the College of new facts or matters which the Panel failed to consider, a rehearing is not warranted.

The Panel is not without sympathy for the position in which the College finds itself. However, the evidence presented to the Panel shows that prior to the bid solicitation's being issued the College Procurement Office was aware that Pitney Bowes placed a different interpretation on the specifications than the College did. It seems imprudent, at best, for the College to immediately enter into a contract with Major when it could have reasonably expected Pitney Bowes to challenge the solicitation. Because the time for protesting in this case was only ten days from the date Pitney Bowes knew that Major was the intended recipient of the contract, it is not unreasonable to expect the College, or any other agency in its position, to wait the ten days before binding itself to a contract, notwithstanding that the Code allows it to proceed immediately.

For the reasons stated above, the College's Petition for Rehearing is denied.

IT IS SO ORDERED.

SOUTH CAROLINA PROCUREMENT
REVIEW PANEL

BY: _____
Hugh K. Leatherman, Sr.
Chairman

2-7, 1989
Columbia, South Carolina

STATE OF SOUTH CAROLINA	)	BEFORE THE SOUTH CAROLINA
	)	PROCUREMENT REVIEW PANEL
COUNTY OF RICHLAND	)	CASE NO. 1988-15
IN RE: PROTEST OF KODAK AND XEROX CORPORATION	)	O R D E R

This case came before the South Carolina Procurement Review Panel for hearing on December 14, 1988, on the protests by Kodak and Xerox Corporation of the decision by the Chief Procurement Officer ("CPO") that the sole source purchase of a Xerox 9900 high-speed copier by the Department of Mental Health ("DMH") was not justified.

Present at the hearing were Department of Mental Health, represented by Helen McFadden, Esq.; the Division of General Services represented by its General Counsel, Wayne Rush, Esq.; and Kodak represented by Robert Coble, Esquire.

FINDINGS OF FACT

On September 21, 1988, Kodak filed a protest with the CPO challenging the sole source procurement of a Xerox 9900 high-speed copier by DMH. (Record, p. 14). Pursuant to S.C. Code Ann. § 11-35-4210 (1976), the CPO held a hearing on October 21, 1988. DMH, Kodak and Xerox were all present at the hearing before the CPO. (Record, p. 10). The CPO issued his decision on October 31.

In his decision the CPO found that DMH was not justified in sole sourcing the copier for the following reasons:

> 1. The requirement of 120 copies per minute, which only Xerox can meet, was not justified because state production standards indicate that to produce 4 million copies per

year (DMH's actual output), a copy speed of 76.10 copies per minute is all that is required.

2. DMH could not produce documentation to substantiate the requirement that its copier needed to handle weights from 16-110#. Only Xerox can meet this standard.

3. DMH's records indicate that less than 1% of its total jobs require that greater than 50 but less than 61 sheets be stapled together. Only Xerox can meet this standard.

4. Kodak's copier can also perform the automatic chargeback functions required.

The CPO found that because the first three requirements were unduly restrictive and because Kodak could meet the fourth requirement, the sole source was not justified. Although he found that the copier contract should have been bid, the CPO gave awarded Kodak no relief.

On November 10, 1988, Kodak appealed the decision of the CPO to the Panel solely on the grounds that the CPO did not award it any relief. In the letter of protest dated November 8 and signed by William Holler, its Major Account Manager, Kodak requests that it be awarded either the equivalent of the revenues it would have derived from contract, the next contract to be solicited or whatever relief the Panel deems appropriate. (Record, pp. 2-3). In its supplemental letter of protest dated November 10 and signed by Charles Black, attorney for Kodak, Kodak requests that the Panel consider granting Kodak the relief of having the contract put out for bid. (Record, pp. 131-32).

Xerox appealed to the Panel on November 10, 1988, on the grounds that the CPO erred in concluding that the contract should

have been bid and the sole source purchase was unjustified. (Record, p. 133). In a letter dated November 10, 1988, DMH stated that it did not wish to appeal the decision of the CPO to the Panel, although DMH apparently did not agree with the findings and conclusions therein. (Record, pp. 138-40).

On December 5, 1988, prior to the hearing before the Panel, Xerox withdrew its appeal leaving only Kodak's appeal on the issue of relief pending before the Panel. (Record, pp. 137). Apparently upon learning that Xerox had withdrawn its appeal and the time to appeal having expired, DMH on December 8 moved the Panel to be allowed to present evidence that the decision to sole source was justified. (Record, p. 134). The Panel responded to DMH by letter of December 9, 1988:

> As of the date of this letter, the Panel understands that the status of the participants is as follows: Kodak has appealed the decision of the Chief Procurement Officer raising only the issue to what relief, if any, it is entitled; Xerox has withdrawn its appeal of the CPO's decision effective December 5, 1988; and [DMH] by letter to Ron Moore dated November 10, 1988, specifically declined to appeal the CPO's decision. It would appear that all the participants in this hearing are bound by the decision of the CPO on the merits of this case.
>
> * * *
>
> [W]hile the Panel may choose to call and examine witnesses and otherwise receive evidence on the correctness of the decision to sole source in this case, except as the Panel requests, the parties . . . will be unable to present evidence on any issue save to what relief, if any, Kodak is entitled.

(Record, p. 135-336).

At the hearing before the Panel, DMH again moved to be allowed to present evidence that the decision to sole source was justified. The Panel advised the parties that, because the decision of the CPO was not appealed except as to relief, the Panel would accept the findings and conclusions of the CPO. The Panel further advised the parties that the only issue on appeal before the Panel was to what relief, if any, Kodak was entitled. DMH proffered the testimony it desired to introduce on the sole source issue and it was made part of the Record in case of appeal.

Kodak presented the testimony of William Holler that he, as a representative of Kodak, spent approximately 30 hours of time pursuing Kodak's rights in this case. At his hourly rate, Mr. Holler estimated this time was worth $1000.00 to Kodak. Mr. Holler also testified that Kodak had retained the firm Nexson Pruet Jacobs & Pollard to assist it before the Panel.

As an alternative to money damages, Kodak requested that the contract be put out for bid.[1] Kodak asserted that the State would incur only minimal damages if bidding were ordered and referenced the present Lease Agreement between Xerox and DMH, which provides at paragraph 13, "This Agreement may be terminated by [DMH's] giving thirty (30) days prior written notice of such termination to [Xerox]. [DMH] shall negotiate reasonable termination costs, if applicable." (Record, p. 67).

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1. At the hearing Kodak abandoned its assertion that it was entitled to award of the next state copier contract as relief.

DMH presented evidence that an addendum, signed by Xerox and the Division of General Services, exists which may alter the termination provision quoted above to provide for payment of the balance of the contract price upon termination by DMH. (DMH Ex. 3). Xerox representatives testified that Xerox considered the addendum to be part of the Lease Agreement. Mr. Colbert Campbell, DMH's Director of Procurement who signed the Lease Agreement for DMH, testified that he was unaware of a signed addendum to the Lease Agreement.

CONCLUSIONS OF LAW

Section 11-35-1560 of the Procurement Code provides:

> A contract may be awarded for a supply, service, or construction item without competition when, under regulations promulgated by the board, the chief procurement officer, the head of the purchasing agency, or a designee of either officer above the level of procurement officer determines in writing that there is only one source for the required supply, service or construction item.

The regulations provide that sole source procurement is prohibited unless there is only one supplier. In case of reasonable doubt, competition should be solicited. Any solicitation by sole source must be accompanied by an explanation why no other product will be suitable or acceptable to meet the end. Reg. 19-445.2105. The regulations governing specifications also provide that specifications must be written in a "non-restrictive manner" to encourage "maximum practicable competition". Reg. 19-445.2140.

The CPO found that DMH did not justify its decision to sole source as is required by the Procurement Code and that three of

the four specifications at issue were unduly restrictive in violation of the Code. As stated earlier, DMH and Xerox chose not to appeal these findings and are, therefore, bound by them.[3] Kodak did appeal asserting that it is entitled to some relief in this case.

Considering the findings of the CPO, the Panel concurs with his conclusion that the contract for DMH's high-speed copier should have been bid in the first instance. Justice requires, however, that the remedy fit the wrong. In this case, Kodak argues that ordering bidding of the contract would have minimal effect on state resources because the existing Lease Agreement provides for termination upon thirty days notice with only "reasonable" costs payable to Xerox.

The evidence suggests, however, that the termination clause in the Lease Agreement may have been modified by a subsequent addendum. There appears to be disagreement between the parties to the contracts on what costs are due upon termination. It is beyond the purview of the Panel on the evidence presented to it to determine whether the addendum applies to the Lease Agreement.

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3. DMH argues that, because the hearing before the Panel is essentially de novo (§ 11-35-4410(5)), DMH is entitled to present all the evidence it chooses on the decision to sole source. If DMH had timely appealed the decision of the CPO as was its right as an adversely affected person (§ 11-35-4210(5)), its argument would have merit. However, if the time limitations on appeal are to have any meaning, DMH must be bound by its decision to accept the CPO's findings. Kodak did not, by applying for relief, open the door for DMH to relitigate its case.

The possibility that it might is enough to weigh against ordering bidding of the contract.

For the reasons stated above, the Panel holds that the most equitable relief available to Kodak in this case is the payment by DMH of Kodak's costs and attorney's fees.

It is therefore ordered that DMH pay to Kodak the sum of One Thousand and 00/100 Dollars ($1000.00) as costs and such reasonable attorneys' fees as may be awarded by the Panel. Kodak is hereby directed to submit to the Panel within fifteen (15) days of the receipt of this Order an affidavit setting forth its attorneys' fees in this case.

IT IS SO ORDERED.

SOUTH CAROLINA PROCUREMENT REVIEW PANEL

Hugh K. Leatherman, Sr.
Chairman

Columbia, S. C.

12.21-88, 1988

STATE OF SOUTH CAROLINA	)	BEFORE THE SOUTH CAROLINA PROCUREMENT REVIEW PANEL
	)	
COUNTY OF RICHLAND	)	CASE NO. 1988-15
IN RE: PROTEST OF KODAK AND XEROX CORPORATION	)	O R D E R

This case originally came before the South Carolina Procurement Review Panel ("Panel") for hearing on December 14, 1988, on the protests by Kodak and Xerox Corporation of the decision by the Chief Procurement Officer ("CPO") that the sole source purchase of a Xerox 9900 high-speed copier by the Department of Mental Health ("DMH") was not justified.

By Order dated December 21, 1988, the Panel upheld the decision of the CPO and awarded Kodak its costs of $1000.00, which were uncontradicted, plus such attorneys' fees as the Panel deemed reasonable. In its Order the Panel directed Kodak to submit a statement of its attorneys' fees within fifteen days. In compliance with that Order, Kodak submitted a statement from its attorneys for $2159.20, which represents 16 attorney hours at $130.00 per hour, .25 clerk hours at $40.00 per hour and expenses of $69.20.

Considering all aspects of this case, the Panel finds that $75.00 per hour is a reasonable rate. Therefore, the Panel orders the Department of Mental Health to pay to Kodak within thirty (30) days of receipt of this Order its costs in the amount of $1000.00 and its attorneys' fees in the amount of $1279.20, which represents 16 attorney hours at

hours at $75.00 per hour, .25 clerk hours at $40.00 per hour plus expenses of $69.20.

IT IS SO ORDERED.

SOUTH CAROLINA PROCUREMENT REVIEW PANEL

Hugh K. Leatherman, Sr.
Chairman

Columbia, S. C.
1-6-89, 1989

STATE OF SOUTH CAROLINA)	BEFORE THE SOUTH CAROLINA
)	PROCUREMENT REVIEW PANEL
COUNTY OF RICHLAND)	CASE NO. 1988-16

IN RE: PROTEST OF WILLIAMSBURG)
COUNTY COUNCIL ON AGING) O R D E R
)

This case came before the South Carolina Procurement Review Panel ("Panel") for hearing on December 7, 1988, on the protest by Williamsburg County Council on Aging (WCCOA) of the decision by The South Carolina Health and Human Services Finance Commission (HHSFC) not to consider WCCOA's proposals for Social Services Block Grant (SSBG) funds to provide homemaker services and home-delivered meals to low-income elderly persons for fiscal year 1988-89.

Present at the hearing before the Panel were the protestant WCCOA, represented by E. N. Zeigler, Esq.; HHSFC, represented by its Assistant General Counsel Richard G. Hepfer, Esq.; and the Division of General Services, represented by its General Counsel, Wayne Rush, Esquire. Also present with counsel though not a party was the South Carolina Commission on Aging, represented by James Ryan, Esq., of the South Carolina Attorney General's Office.

FINDINGS OF FACT

Every fiscal year HHSFC issues Requests for Proposals for two contracts funded by SSBG funds: one to provide homemaker services to low-income persons, the other to provide home-delivered meals to low-income elderly persons. For several years, both contracts for the Williamsburg County area have been awarded to the protestant WCCOA.

Mrs. Jean W. McCabe, the Executive Director of WCCOA, testified that, in addition to SSBG money, WCCOA receives Williamsburg County Council funds, federal funding pursuant to the Older Americans Act, funding under the Long Term Care for the Elderly program, funds from the South Carolina Commission on Aging, and money generated from contributions and fund-raising projects.

On or about July 26, 1988, WCCOA submitted proposals for the homemaker services and home-delivered meals SSBG contracts for fiscal year 1988-89. (Record, p. 120). On August 9, 1988, HHSFC notified WCCOA that its 1987-88 contract for home-delivered meals was terminated because of Williamsburg's alleged breach of one provision of the contract. The notice further informed WCCOA that, even though no irregularities existed with respect thereto, its 1987-88 contract for provision of homemaker services was also terminated because "an agency with a single administrative structure cannot be responsible and accountable in one program and not in the other."[1] (Record, p. 391).

On September 14 and 15, 1988, HHSFC notified WCCOA that its 1988-89 proposals for homemaker services and home-

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1. WCCOA protested the decision to terminate the 1987-88 contracts. That protest is pending before HHSFC and is not before the Panel in this case.

delivered meals would not be considered because of the termination of the previous year's contracts.(Record, p. 57). The services formerly being provided by WCCOA are now being provided by the Sumter County Council on Aging on an emergency procurement basis.

At issue in this case is the conduct of WCCOA as it relates to section G of the contract for home-delivered meals which states:

> G. Payment in Full
>
> Payment by HHSFC for services to a recipient under this contract shall constitute payment in full to the Provider and the Provider shall not bill, request, demand, solicit, or in any manner receive or accept payment from any person, family member, relative, organization or entity for care or services to a recipient except as may otherwise be allowed under federal regulations or in accordance with HHSFC policy. Any collection of payments or deposits in violation of this section shall be grounds for termination of this contract . . . .

(Emphasis added). (Record, p. 264).

HHSFC issued a Policy Clarification of section G on May 15, 1987.[2] The clarification states, in part:

> Recently it has come to our attention that some contractors who are not participating in the Fee Pilots are requiring SSBG clients to share in the cost of SSBG services. . . .
>
> Some staff and clients are confused in that they do not understand the difference in a voluntary contribution and a payment for services. The terms contribution, donation,

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2. The Policy Clarification was put into the record for the first time at the hearing before the Panel and was not made available to the Chief Procurement Officer at the hearing before him.

> fee and payment are being used interchangeably.
>
> Voluntary contributions or donations are "gifts, freely given, without persuasion, coercion or legal obligation. Fees or payments for service are legal obligations and are required in order to receive the service. Contractors may not bill, request, demand or solicit fees or payments for services from any SSBG client, family member, relative or organization. SSBG clients may be allowed to make voluntary contributions provided it is truly "voluntary". SSBG clients should not be made to feel as if they must contribute in order to receive the service . . . .

(Emphasis added). (Record, Pltf.'s Ex. 1).

There is no question that WCCOA accepted money from SSBG clients. The question is whether such funds were contributions freely given or fees required for service.

Mrs. McCabe testified that prior to October 1986, WCCOA received only contributions from its SSBG clients. In 1986, HHSFC initiated a Fees Pilot program in which SSBG clients, in order to receive service, were required to pay either a flat fee or a fee determined by a sliding scale based on income. If a client qualified, he or she could obtain a waiver to continue receiving meals at a reduced rate or at no charge.

According to Mrs. McCabe, WCCOA elected to participate in the Fees Pilot program in October 1986 and charge a flat fee. WCCOA withdrew from the program within the month, however, because, according to Mrs. McCabe, the clients were complaining about the amount of the fees charged and were confused as to why some people had to pay (SSBG clients) and others did not. Because of this confusion, WCCOA went back to accepting

contributions from its SSBG clients.[3] Mrs. McCabe testified that, other than the Fees Pilot program, WCCOA never at any time directed that SSBG clients had to pay money or face termination of their services and WCCOA never at any time terminated a SSBG client for nonpayment.

Contradicting Mrs. McCabe are two letters introduced into evidence. One letter dated June 5, 1987, signed by Bernice Barr, Homemaker Service Supervisor for WCCOA, and addressed, "Dear Recipients" states as follows:

> Beginning July 1, 1987, Williamsburg County Council on Aging will be implementing a fee program for all clients receiving homemaker services.
>
> This program is 75% federally funded, we must match this with local dollars in order to continue your services. Due to a reduction in funds this fee is necessary so that we may continue to serve you in your homes.
>
> We are requesting a fee of $1.00 per visit. Each client who receives services from a homemaker will be required to pay this fee.

(Record, Def.'s Ex. 3). Mrs. McCabe testified that she believes that the above letter was directed to clients other than SSBG clients. Several other witnesses testified, however, that the SSBG program was the only WCCOA program that was 75% federally funded at the time. (See, Testimony of David R. Smith and Alice Eddings). In addition, Mr. Charles Fulton of the Williamsburg County Department of Social Services testified that some of his

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3. Ms. Libby Chapman of HHSFC's Division of Program Development, testified that Mrs. McCabe informed her on October 10 that WCCOA was withdrawing from the program because it did not want to give clients waivers.

clients, all of whom were SSBG clients of WCCOA, told him they felt compelled to pay for services after receiving the June 5, 1987 letter. The Panel finds that the June 5, 1987 letter was directed to WCCOA's SSBG clients.

The second letter is in memo form, undated, from Mrs. McCabe to "All Recipients of Council on Aging Meals". This memo states:

> As you know all federal monies require matching dollars. The only way to obtain these matching dollars is by participants contributions.
>
> In order to keep our programs going, we must increase our contribution or cut the number of meals served.
>
> As of July 1, 1987 the WCCOA is asking a 50c contribution from each individual who receives a meal. We are required to put this money into the budget, where it is recorded and used for program expenses.
>
> If you value your meal program let us know by your support. If not let others have a chance to eat.

(Record, p. 408). Mrs. McCabe testified that this memo was distributed only to meal sites where no SSBG clients were present. Mrs. McCabe admitted that it was possible that some SSBG clients may have seen the memo.

At page 79 of the Record is a ledger sheet captioned "SSBG Home Delivered Meals Fees Collected" with a month date of October 1986. There is a specific column for "Balance Owed". The dates of the entries range from September 29 to November 8. Ms. Shelia Dicks, a former employee of WCCOA, who claims authorship of the form could not remember how long the form was in use. She does remember that at some point she stopped using the "Balance Owed" column.

In July 1987, Waccamaw Regional Planning and Development Council forwarded to WCCOA a complaint that several unnamed clients were being charged for services. (Record, p. 409). In reply, Mrs. McCabe stated in a July 14, 1987 letter:

> No Title III participants are being charged for services, nor have they ever been charged. They are, however, strongly urged to make a fair contribution.

(Record, p. 410). Title III participants are not the same as SSBG participants. Under the Title III program (Older Americans Act) fees are prohibited but participants must be encouraged to contribute.

On August 7, 1987, WCCOA received through the South Carolina Commission on Aging another complaint, forwarded by Congressman Tallon's office, that unidentified recipients were being charged for meals. Again, WCCOA responded:

> WCCOA does not currently nor have we ever charged for Older Americans Act services. We do not make a charge in order to provide or continue service. We do, however, actively solicit contributions and donations for services provided in part by Older Americans Act Funds (Title III). . . . I believe that there has been some confusion among clients and staff in that the terms contributions, donations, fee and payment are being used interchangeably.

(Record, p. 412). The letter goes on to advise that clients are being contacted and informed that contributions are voluntary and do not affect service.

Mrs. McCabe testified that after receiving notice of the complaints she sent letters advising all participants that there were no mandatory charges for WCCOA services. These letters appear in the Record at pages 414 through 416. One of the

letters dated August 25, 1987, specifically refers to the SSBG program and states:

> There has been some misunderstanding concerning our Social Services Block Grant programs.
>
> * * *
>
> WCCOA does not charge a fee for our SSBG services. You are currently receiving service through an SSBG program and there is no charge for this service.

(Record, p. 415). The letters have a blank at the bottom for the client to acknowledge receipt and understanding of the letter. Mrs. McCabe testified that WCCOA collected acknowledgments from 33 of 35 SSBG clients.

Mrs. Ruth Geddings and Mrs. Florence Caster, staff members of WCCOA, and Mr. Julius Oliver, a Board member of WCCOA, testified that they had always made it clear when they visited clients that all payments were voluntary and that service would continue whether or nor payment was made.

Mrs. Sarah Singletary, a recipient of WCCOA's services, stated that she contributed when she could but when she could not her service had always continued. Mr. Dozier, another recipient, testified that he could not afford to pay at all and that he still received service. Neither witness knew whether he or she was an SSBG client.

As part of its being eligible to receive funds through HHSFC, WCCOA is reviewed every year by the South Carolina Commission on Aging. Ms. Alice Eddings, Senior Accountant for the South Carolina Commission on Aging, testified that on July 21-24, 1987, she performed the financial assessment summarized as

"SCCOA findings" at pages 65-78. Part of her report indicates that:

> Participants are being charged for services and advised that they will not be served if they can no [sic] pay. What are apparently charges for congregate and home delivered meals were increased from $5.00 a month (or $.25 a day) to $10.00 a month (or $.50 a day). Homemaker Service was increased to $1.00 per visit from $.50 per visit.
>
> * * *
>
> The Social Services Block Grant participants also pay for the meals they receive on the basis of $.25 a day or $.50 a day beginning July 1, 1987.

(Record, pp. 68-69). Ms. Eddings testified that she did not personally interview the clients,[4] however, she did observe receipts for payment of meals by SSBG clients. Ms. Eddings admitted that she could not tell by looking at the receipts whether the payments were voluntary or not.

Ms. Eddings also testified that she requested the minutes of the WCCOA Board and received, among others, minutes which indicated:

> Starting July 1, 1986, we requested a fee of .50¢ per meals for SSBG clients. Also beginning July 1, 1987 a donation/ contribution of .50¢ will be suggested for other meals."

(Record, Def.'s Ex. 5). Ms. Eddings testified that another version of these minutes was discovered by a member of the

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4. The person who interviewed the clients, Mr. Arliss Epps, is deceased.

Commission on Aging staff. These minutes stated:

> Starting October 1, 1986, we requested a fee of .50¢ per meal for SSBG clients. Also, beginning January 1, 1987, all meals will be .50¢. There will definitely be no more "free-bies."

(Record, Def.'s Ex. 6). Mrs. McCabe testified that the October 1 minutes were a corrected form of the July minutes.

According to Ms. Eddings, as a result of her findings the South Carolina Commission on Aging requested the State Auditor's Office to commission an independent audit of WCCOA. David R. Smith, a Certified Public Accountant, testified that he was retained by the State Auditor's Office to perform an expanded audit of WCCOA for fiscal year 86-87. According to Mr. Smith, his expanded audit was conducted much like an investigation in that the Auditor' Office gave him a specific list of suspected problems to look into. One of the problem areas was the alleged payment of fees by SSBG and other clients.

Mr. Smith testified that he personally interviewed clients and in his report he concludes, "Based on my site visits and visits by officials of the South Carolina Commission on Aging there appears to be some confusion as to the application of the [contribution] policy. Some clients were of the opinion that they must make contributions and that lists are maintained of those who paid. Other clients stated that they were not required to pay and would still receive meals." (Record, p. 374).

Based on its financial assessment and Mr. Smith's audit findings, the South Carolina Commission on Aging recommended to HHSFC that WCCOA not be considered a responsive and acceptable

provider. (Record, p. 61). Several months after it received the Commission's recommendation, HHSFC conducted its own investigation of WCCOA on July 27, 29, and August 2, 1988.

Mr. Robert L. Coffey of HHSFC's Program Monitoring Department, and a member of his staff, Mr. Randy Jenkins, testified that they personally interviewed SSBG recipients of both homemaker and home-delivered meals services. Their survey results were introduced into the Record as Def.'s Ex. 9 and 10. As summarized by Mr. Coffey, the findings indicate that of 17 homemaker services clients, 12 paid fees, 3 paid contributions and 2 pay nothing. Of 14 meal recipients, 7 paid fees, 3 paid contributions, 3 paid nothing and 1 was unclassified.

Under cross-examination, Mr. Coffey and Mr. Jenkins both admitted that some of the recipients they classified as paying fees actually stated that they used to pay money but were recently informed that all payments were voluntary. The survey is unclear whether any of the clients surveyed had actually been terminated for failure to pay.

As a result of its findings and the Commission on Aging and David Smith's findings, HHSFC made the decision to terminate WCCOA's 1987-88 contracts and not to consider its proposals for the 1988-89 year. HHSFC did not give WCCOA the opportunity to respond to its findings prior to termination. HHSFC did have in its possession WCCOA's response to David Smith's audit.

CONCLUSIONS OF LAW

HHSFC refused to consider WCCOA's proposals because it found that WCCOA had violated its home-delivered meals contract by

charging a fee for delivering meals to its clients. WCCOA takes the position the funds it received were voluntary donations to enhance the program and not fees for services.

The Chief Procurement Officer (CPO) in his Decision dated October 28, 1988, found that, under section G of the meals contract, even receiving donations was prohibited and that, therefore, WCCOA was in violation of the contract no matter how the funds it received were classified. As stated earlier, the CPO reached his decision without benefit of the Policy Clarification. In light of the Clarification, the determination by the CPO that even donations were prohibited is clearly erroneous.

The question presented to the Panel which the CPO did not reach is whether funds received by WCCOA from its SSBG clients were voluntarily given or, in the words of the Policy Clarification, whether WCCOA's SSBG clients were "made to feel as if they must contribute in order to receive service." Weighing all the evidence, the Panel holds HHSFC was justified in concluding that WCCOA's conduct was coercive and amounted to soliciting payments for services in violation of its 1987-88 contract.

In late July 1987, the South Carolina Commission on Aging found that WCCOA was charging its SSBG clients for meals. Its conclusions were based on client interviews and inspection of WCCOA's Board meeting minutes. In October 1987 David R. Smith completed an investigative audit that confirmed the Commission's findings. Again, the conclusions were based on client interviews

and inspection of WCCOA's internal documents. HHSFC in July 1988 found evidence that at least some SSBG meal clients were still under the impression that they had to pay to eat. Admittedly, some of the clients surveyed stated that they had recently been informed that payment was voluntary.

Also supporting HHSFC's position are various WCCOA documents presented to the Panel. The memo, which appears at page 408 of the Record, is addressed to "All recipients of Council on Aging Meals" and by Mrs. McCabe's own admission could have been seen by SSBG clients. That memo contains the language, "In order to keep our programs going, we must increase our contributions or cut the number of meals served. . . . If you value your meal program let us know by your support. If not, let others have a chance to eat." The Panel finds this language coercive in that it could easily cause a recipient to feel that meals would be cut and others would "have a chance to eat" if he did not make a contribution.

Also the ledger sheet appearing at page 79 shows "fees" collected from SSBG clients starting September 29, 1986 and continuing through November 8, 1986. All of the testimony before the Panel indicated that WCCOA was in the Fees Pilot program no earlier than October 1 and no later than October 31. One witness placed WCCOA's withdrawal from the program as early as October 10.

While it is clear that, by July 1988, WCCOA was taking remedial steps to clarify the contribution policy, it is equally clear that WCCOA violated that policy during the 1987-88 contract

year. Section G of the contract states that violation of that section is grounds for termination. It is proper under the Procurement Code to consider past violation of a contract when determining responsibility of a provider. S. C. Code Ann. §11-35-1810 (1976). HHSFC was justified in terminating the contract and was, therefore, justified in not considering WCCOA's proposals for 1988-89.

Although HHSFC did not give it as a grounds for termination, the Panel notes that WCCOA also violated its homemaker services contract. The Panel finds that the June 5, 1987 letter directed to SSBG clients uses coercive language to collect funds. Specifically, the letter states, "Beginning July 1, 1987, [WCCOA] will be implementing a fee program for all clients receiving homemaker services. . . .Due to a reduction in funds this fee is necessary so that we may continue to serve you in your homes. . . Each client who receives services from a homemaker will be required to pay this fee." An SSBG client receiving this letter could easily conclude that he would risk losing service if he did not pay the fee. The testimony of Charles Fulton that his clients felt compelled to pay after they received the letter supports this conclusion.

For the reasons stated above, the Panel holds that HHSFC was justified in refusing to consider WCCOA's proposals for 1988-89 fiscal year. The Panel also holds that the decision of the CPO, though right in result, is erroneous in reasoning.

IT IS THEREFORE ORDERED that the decision of the CPO dated October 28, 1988 is reversed as to everything but result and the protest of WCCOA is dismissed.

SOUTH CAROLINA PROCUREMENT
REVIEW PANEL

Hugh K. Leatherman, Sr.
Chairman

Columbia, S. C.
12-14-88, 1988

STATE OF SOUTH CAROLINA	)	BEFORE THE SOUTH CAROLINA
	)	PROCUREMENT REVIEW PANEL
COUNTY OF RICHLAND	)	CASE NO. 1988-17
IN RE: PROTEST OF PRACTORCARE, INC.	)	O R D E R

This case came before the South Carolina Procurement Review Panel ("the Panel") for review on December 14, 1988, on the protest by Practorcare, Inc., of the award of a contract to provide software for a food management and nutritional analysis system for the Department of Mental Health ("DMH").

Present before the Panel were DMH represented by its General Counsel Kennerly McLendon, Esq., and the Division of General Services, represented by its General Counsel Wayne Rush, Esq. The protestant Practorcare, Inc., submitted its case on the affidavit of Panayotis Economopoulos, Ph.D., and the record. DMH and General Services made brief opening statements to the Panel and submitted their cases on the record. The Panel on its own initiative interviewed as witnesses the Chief Procurement Officer, Ron Moore, and the four DMH employees who evaluated the proposals submitted by the Protestant and other vendors on this procurement.

FINDING OF FACTS

Considering the affidavit of Mr. Economopoulos, the record on appeal and the testimony of the witnesses, the Panel makes the following findings of fact. On July 28, 1988, MMO issued a Request for Proposals to provide software

for a food management and nutritional analysis system for DMH. As one of its requirements, the RFP stated:

> VIII. SUPPORT
>
> DMH anticipates that the vendor will provide support for the software should a problem occur. Specify the following information:
>
> 1. Who DMH would contact if a problem is encountered or questions are raised. Specify the position of the contact within the vendor organization and the location of the office which would service DMH.
>
> 2. Would a toll-free phone number be provided for support.
>
> 3. Describe the time period that could elapse before a response is received from the vendor after a problem has been reported.
>
> 4. Describe the procedure to be followed to correct an identified problem. Specify any applicable cost incurred by DMH for the support by the vendor.
>
> 5. Specify the location of the vendor office which would provide support to DMH.

(Record, p. 39). In its proposal Practorcare responded with all the information requested. (Record, p. 90-91).

A cost sheet for each site was to be included in each proposal. The cost sheet listed eleven categories with blanks for Years 1 through 5. Category 10 of the cost sheet is captioned, "Support". Practorcare listed a total cost of $28,500.00 for support at DMH for five years. (Record, pp. 85).

Practorcare's total proposal cost came to $127,600 including the cost of on-site support. The proposal which was accepted, Computrition, came to $111,115. There were two other proposals submitted.

On August 22, 1988, the proposals were opened publicly but the bid amounts were not made public. After the proposals were opened, MMO determined responsiveness and responsibility. The proposals were then turned over to four evaluators. The evaluators gave Practorcare 383.8 out of 400 possible points. Computrition received 390 of 400 points.

Three of the four evaluators stated that they scored Practorcare higher than Computrition in the support category. David Poster testified that he ranked Practorcare's support superior because Practorcare indicated that it would provide on-site support. Mr. Poster stated that he would rank Practorcare equal with Computrition without the on-site support. Evelyn Moose testified that she ranked Practorcare superior because of the on-site support and because Practorcare's service staff is closer to Columbia than Computrition's. Finally, Robert Bowers testified that he ranked Practorcare higher in the support category because of geographic location. James Boggs testified that he considered Practorcare and Computrition equal in the support area.

On October 5, 1988, MMO issued the Intent to Award to Computrition. On October 6, Practorcare wrote to MMO requesting information on which specifications Practorcare failed to meet. Practorcare summarized its on-site support and training system, stated that the on-site support was optional and offered to reduce its proposal cost by $22,000 to $105,600 if on-site support was excluded. Practorcare finally requested that it and

the other offerers be allowed to demonstrate their system. (Record, pp. 17-18).

On October 14, MMO responded to Practorcare that Practorcare had met all technical specifications and that Practorcare could not after opening reduce its proposal cost to exclude on-site support. MMO also explained that no system demonstration was required by the RFP and that none would be allowed after the Intent to Award had been issued. (Record, pp. 14-15).

On October 17, Practorcare again wrote MMO seeking to support its position that "the committee miscalculated the total cost of [its] proposal . . . by including the optional on-site support . . . ." (Record, p. 12) Practorcare stated in conclusion that "We priced category 10 separately as an option in case you wanted on-site support. We should not be penalized for attempting to offer you more service." (Record, p. 13).

On October 21, Practorcare formally protested the award to Computrition giving as grounds that its price was the lowest because category 10 was optional and that the evaluators failed to consider that Practorcare's expenses for training were less than Computrition's because Practorcare's office is closer to Columbia.[1]

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1. Although not raised by the parties, it appears that Practorcare's protest to the CPO may have been untimely. The October 6 letter, written one day after the Notice of Intent to Award, indicates that Practorcare was aware that its failure to get the contract was related to the "optional" support cost. Practorcare did not protest until October 21, 14 days after that letter and 15 days after Notice of Intent to Award.

The CPO decided the case without a hearing based on the documents in his possession. The CPO found that Practorcare did not specify that on-site support was optional and could not alter its proposal after opening and that no error had been made by the evaluators in calculating support costs.

CONCLUSIONS OF LAW

On appeal to the CPO, Practorcare claimed that the evaluators should have realized that its on-site support costs were optional. The CPO found and the Panel concurs that Practorcare nowhere indicated in its proposal that the support cost was optional - that DMH could reduce the total cost by $22,000 at its option.

In In Re: Protest of CNC Company, Case No. 1988-5, the Panel found that the failure of CNC to fill in installation charges and total bid charges in the appropriate blanks on the bid form rendered it unresponsive. CNC argued that installation charges were included in its unit and total unit price charges and that a simple calculation of the unit prices would have revealed the total bid price. The Panel noted, "General Services could not assume that CNC's bid was the total of total unit price and it could not contact CNC after the bids were opened for clarification. To do so would have been patently unfair to the other bidders . . . ."

Likewise in this case, DMH could not in fairness to the other bidders simply assume that a portion of Practorcare's quoted cost was optional. Section 11-35-1510 provides:

> Award must be made to the responsible offeror whose proposal is determined to be the most

> advantageous to the State, taking into consideration price and the other evaluation factors set forth in the request for proposals. No other factors or criteria may be used in evaluation and there must be adherence to any weightings specified for each factor in the request for proposals.

The Procurement Code prohibited the evaluators in this case from considering any factor not listed in the Request for Proposals. The Panel finds that the evaluators acted properly in considering Practorcare's total cost as written.

On appeal to the Panel, Practorcare raises three issues. First, Practorcare claims that the support specification is ambiguous in that Practorcare could reasonably interpret "support" to mean only on-site support since training, maintenance, enhancement and upgrade were all listed as separate categories.[2]

The Panel has reviewed specification in question and can find nothing ambiguous therein. The specification neither specifically excludes nor includes on-site support. The CPO, Ron Moore, testified that on-site support was not necessary to insure success of the project but that vendors were always free to propose more that the Request For Proposals required. The Panel finds that, if a reasonable question existed in Practorcare's mind, it was incumbent on it to asks questions as is provided in the Request For Proposals at paragraph 1.1.5. (Record, p. 57).

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2. This argument seems inconsistent with Practorcare's argument to the CPO that it intended on-site support to be optional all along.

Practorcare's second argument is that the evaluators failed to consider that Practorcare's training expenses were less than Computrition because its office is closer to Columbia. There is no evidence in the record to indicate whether or not the evaluators considered location in the training category. Further the Request For Proposals does not require that location be considered in the training category. The Panel finds that the evaluators properly considered Practorcare's proposal in the training category.

Finally Practorcare argues that its proposal met all the requirements of the Request For Proposal and cannot be disqualified for that reason. The evidence before the Panel plainly shows that Practorcare's proposal did in fact meet the specifications and was in fact fully considered by DMH. Practorcare's proposal was not disqualified as is suggested by Practorcare. The Panel find no merit in Practorcare's third argument.

For the reasons stated above, the Panel affirms the November 3, 1988 decision of the CPO and orders that the protest of Practorcare be dismissed.

IT IS SO ORDERED.

SOUTH CAROLINA PROCUREMENT
REVIEW PANEL

Hugh K. Leatherman, Sr.
Chairman

Columbia, S. C.

_____, 1988

STATE OF SOUTH CAROLINA	)	BEFORE THE SOUTH CAROLINA
	)	PROCUREMENT REVIEW PANEL
COUNTY OF RICHLAND	)	CASE NO. 1988-18

IN RE:	)	
	)	
PROTEST OF FIRST CAPITAL LEASING AND INVESTMENT COMPANY, INC.	)	O R D E R
	)	

December 21, 1988

William F. Able, Esq.
Able & Associates
1415 Richland Street
Columbia, S. C. 29201

Re: Case No. 1988-18 In Re: Protest of First Capital Leasing and Investment, Inc.

Dear Mr. Able:

On December 19, 1988, the South Carolina Procurement Review Panel received your letter of December 15, 1988, filing a protest on behalf of your client First Capital Leasing and Investment, Inc. From your letter it appears your client is protesting the award of lease purchase financing for renovations and additions to the Williamsburg County jail.

Section 11-35-40 of the Consolidated Procurement Code provides:

> This code shall apply to every expenditure of funds by this State under contract acting through a governmental body as herein defined irrespective of the source of the funds . . .

Section 11-35-310(18) defines "Governmental body" to mean:

> [A]ny state government department, commission, council, board, bureau, committee, institution, college, university, technical school, legislative body, agency, government corporation, or other establishment or official of the executive, judicial or legislative branches of this State. Governmental body excludes the General Assembly and all local political

> subdivisions such as counties, municipalities, school districts or public service or special purpose districts.

(Emphasis added).

Please be advised that, under the above-quoted sections, the Procurement Review Panel has no jurisdiction over the expenditure of funds by counties and, therefore, has no authority to hear your client's protest.

If the Panel misunderstands the nature of your client's protest, please let me know immediately. Otherwise, the protest of First Capital Leasing and Investment, Inc., is hereby dismissed for lack of jurisdiction.

Sincerely,

Hugh K. Leatherman, Sr.
Chairman, South Carolina
Procurement Review Panel

cc: Charles David Barr, Esq.

STATE OF SOUTH CAROLINA)	BEFORE THE SOUTH CAROLINA
)	PROCUREMENT REVIEW PANEL
COUNTY OF RICHLAND)	CASE NO. 1988-19

IN RE:)
)
PROTEST OF XEROX CORPORATION) O R D E R
)

This case came before the South Carolina Procurement Review Panel ("Panel") for hearing on January 6, 1989, on the protest by Xerox Corporation ("Xerox") of the decision of the Chief Procurement Officer ("CPO") to rebid a contract to provide two high-speed copiers to the Department of Education ("DOE").

Present at the hearing before the Panel were Xerox, represented by Daniel Brailsford, Esq.; Kodak, represented by Robert W. Coble, Esq.; and the Division of General Services, represented by its General Counsel Wayne Rush, Esquire.

FINDINGS OF FACT[1]

On September 14, 1988, the Division of General Services Materials Management Office ("MMO") issued an Invitation for Bids on a contract to provide two high-speed copiers to DOE. (Record, p. 27). This was the first invitation for bids of this particular type.

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[1]None of the parties chose to present testimony, choosing instead to rely on the record below. The Panel, on its own initiative, interviewed Mr. William Holler.

The specifications provided at number 12, "Cost to include cancellation and removal charge of $9022.00 total for both machines." (Record, p. 36). The bidding schedule provided, "ALL MAINTENANCE COST MUST BE INCLUDED IN RENTAL COST AND CANCELLATION AND REMOVAL CHARGES OF $9,022.00." (Record, p. 37). The cancellation charge referred to is the cost to cancel the agreement covering the Xerox copiers that were in place at DOE. The removal charge is the cost to remove those machines.

Kodak filled in the cost on its bidding schedule as follows:

> Rental price $ 3000 per month x (36) months
> (includes $9,022 payoff credit)..... = $ 108,000

(Record, p. 37). Mr. William Holler of Kodak testified that the notation "includes $9,022 payoff credit" was written by him with the intent of indicating that Kodak had given the State a discount which included a credit in an amount equal to the $9,022 in cancellation and removal charges. According to Mr. Holler, Kodak policy prevented it from making payment directly to Xerox or any other vendor. The only way Kodak could include the $9,022 in its bid was to give the State a discount in that amount.[2]

Bids were opened by MMO on October 6, 1988, and Kodak was determined to have the low bid. The total bid by Kodak

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[2]Because it was the recipient of the $9,022 removal and cancellation fees, Xerox apparently did not have to consider whether it could pay off another vendor.

was $245,518. (Record, p. 37). Xerox submitted three bids which totalled $279,832.00, $281,576.00 and $311,732.00.

According to Mr. Holler, sometime after bid opening, MMO corresponded with Kodak to verify that the State would be responsible for paying Xerox. Because it determined Kodak to be the lowest responsive and responsible bidder, on November 3, 1988, MMO issued the Notice of Intent to Award to Kodak for $254,540.00. (Record, p. 23). This amount reflected the $245,518 to be paid to Kodak, plus the $9,022 to be paid to Xerox.

On November 7, Xerox requested copies of MMO's bid tabulation sheet and of Kodak's bid. On November 17, 1988, Xerox protested the award to Kodak, alleging as grounds:

> 1. Kodak was not a responsive bidder in that it failed to include the removal and cancellation charges in its total price as required.
>
> 2. MMO's interpreting Kodak's bid to be a discount to which $9,022 needed to be added to get the actual price amounted to MMO allowing Kodak to alter its bid after opening in violation of § 11-35-1520(8), which prohibits changes in bid prices after opening when the changes are prejudicial to fair competition.

The CPO, in his decision dated December 7, 1988, found that Kodak interpreted the specifications to allow the total price to reflect a discount of $9,022. The CPO held that because Kodak had always intended the $9,022 as a credit, MMO had not allowed Kodak to alter its price after opening in violation of §11-35-1520(8). The CPO further found that the instruction "ALL MAINTENANCE COST MUST BE INCLUDED IN

RENTAL COST AND CANCELLATION AND REMOVAL CHARGES OF $9,022.00" could be interpreted in two ways and was therefore ambiguous.

The CPO ordered that the contract be rebid and that MMO clarify its instructions by including a line for vendor's cost, a line for cost for removal, plus a line for total cost to State.

CONCLUSIONS OF LAW

The Procurement Code requires that in the competitive bidding process the "contract shall be awarded to the lowest responsible and responsive bidder whose bid meets the requirements and criteria set forth in the invitation for bids. . . ." S. C. Code Ann. §11-35-1520(8)(1976) and Reg. 19-445.2090. A bidder, therefore, may not receive a contract unless its bid is responsive to the requirements of the solicitation.[3] A responsive bidder is defined as "a person who has submitted a bid which conforms in all material aspects to the invitation for bids". S. C. Code Ann. §11-35-1410(7)(1976).

Xerox argues that Kodak is not a responsive bidder because it did not add the $9,022 installation and removal

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[3]Kodak and the Division of General Services argue that Xerox is not prejudiced in this case because even after the addition of $9,022 to Kodak's bid, it is still the low bidder by several thousands of dollars. Xerox argues that the amount of the bids is immaterial if, as it suggests, Kodak is not responsive. Xerox is correct. The determination of responsiveness is independent of price.

charges to the amount bid. Xerox interprets the instruction "ALL MAINTENANCE COST MUST BE INCLUDED IN RENTAL COST AND CANCELLATION AND REMOVAL CHARGES OF $9,022.00" to allow only the addition of those charges to the total amount bid. Kodak and General Services argue that Kodak was responsive because by giving the State a $9,022 discount Kodak "included" the cancellation and removal charges in its rental cost.

The Panel agrees with Kodak and General Service's interpretation of the requirements of the bid solicitation. The general definition of "include" is to "have or take in as a part or member; contain." The American Heritage Dictionary 651 (2d ed. 1982). In calculating its rental cost Kodak considered that the State would have to pay $9,022 to Xerox before it could install new machines and, in recognition of this fact, incorporated a discount of $9,022 in its bid. Kodak signalled its intention by noting "includes $9,022 payoff credit" next to its rental cost calculations.

Kodak's rental cost includes the required removal and cancellation charges and, therefore, meets the specifications. The Panel finds that Kodak is a responsive bidder under §§11-35-1410(7) and -1520(8).

Xerox further argues that Kodak's bid must be rejected because it is unclear on its face whether the total cost to the State is $245,518 or $254,540. Xerox cites earlier cases decided by the Panel for the proposition the State may

not assume the intent of a vendor or contact a vendor after bid opening for clarification. In Re: Protest of CNC Company, Case No. 1988-5; In Re: Protest of J & T Technology, Case No. 1983-4. See also, In Re: Protest of Practorcare, Inc., Case No. 1988-17. The Panel recognizes the principle of law cited by Xerox but finds that it does not apply in this case.

When Kodak submitted its bid, the bid bore the notation "includes $9,022 payoff credit." The Panel agrees with the CPO's finding that "the statement made by Kodak means the cost shown represents the whole (total) cost from which a sum has already been deducted to account for the $9,022 payoff, or more simply if Kodak was to collect and pay the $9,022, the monthly cost would have been higher." (12/7/88 Decision of the CPO, Record, p. 9). If Kodak had been silent like the vendor in the CNC Company case and not indicated that its rental cost "includes $9,022 payoff credit", then Xerox's argument would be persuasive.[4]

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[4]In the competitive bidding process, except as allowed by the Procurement Code, the State's contacting the apparent low bidder for clarification prior to award is improper because it usually results in prejudice to the other vendors. Section 11-35-1520(8) which allows correction of bids provides, "After bid opening no changes in bid prices or other provisions of bids prejudicial to the interests of the State or fair competition shall be permitted." In this case no real correction has been made - Kodak still receives only the total amount it bid ($245,518). The State's attempt to reflect the total cost to it by adding to Kodak's bid the $9022 that Xerox will receive does not prejudice fair competition. Kodak did not become responsive because

(Footnote Continued)

For the reasons stated above, the Panel orders that the contract in question be awarded to Kodak as the lowest responsive and responsible bidder. The December 7, 1988, Decision of the CPO is reversed.

IT IS SO ORDERED.

SOUTH CAROLINA PROCUREMENT
REVIEW PANEL

BY: Hugh K. Leatherman
Hugh K. Leatherman, Sr.
Chairman

JANUARY 19, 1989
Columbia, South Carolina

(Footnote Continued)
of the addition nor did it become the low bidder. It simply remained so.

STATE OF SOUTH CAROLINA	)	BEFORE THE SOUTH CAROLINA
	)	PROCUREMENT REVIEW PANEL
COUNTY OF RICHLAND	)	CASE NO. 1988-20

IN RE:
PROTEST OF BYTES & TYPES) O R D E R
)

This case came before the South Carolina Procurement Review Panel ("Panel") for hearing on February 13, 1989, on the appeal by Bytes & Types of the Chief Procurement Officer's ("CPO") decision not to award it costs after it successfully defended a vendor complaint brought against it by the Legislative Audit Council ("LAC").

Present at the hearing before the Panel were the Legislative Audit Council, represented by Edwin E. Evans, Esq., of the South Carolina Attorney General's Office, and Division of General Services, represented by Helen Zeigler, Esquire. Bytes & Types was present and represented by its owner, Naccalula M. Moon.

FINDINGS OF FACTS

The appellant Bytes & Types was under state contract to perform maintenance on certain computers owned by LAC (Record, pp. 45, 47-54). While the contract was still in effect, LAC put out for bid the job of installing hard cards on the computers. The winning vendor was NAYCO. The evidence before the Panel and the CPO indicated that, prior to NAYCO's attempt at installing the hard card, the computer in question operated properly. After NAYCO's attempt, it did not. Bytes & Types claims, and the CPO agreed, that in

the course of installing the hard card, NAYCO damaged LAC computer.

On June 21, 1988, Lois D. Tarte, an Assistant Director of LAC, notified Bytes & Types' owner Naccalula M. Moon that it was having trouble with the computer and the installation of the hard card. Ms. Tarte suggested that Bytes & Types might want to be present for the second attempt to install the card on June 22 at 2:30 p. m.[1] Ms. Tarte also reported to Bytes & Types that the computer in question had a broken ground plug.

The next morning, Ms. Moon arrived at LAC at 10:30 a.m. (rather than 2:30 p.m. as requested) at which time she repaired the broken ground plug. Without being instructed by LAC[2], she also performed a diagnosis of the computer and determined that it had a blown system board most likely caused by the NAYCO serviceman failing to ground himself properly.

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[1]Ms. Moon testified before the Panel that during the June 21, 1988, telephone conversation, she advised Ms. Tarte that it did not appear that the repair of the damaged computer was covered by the standard maintenance contract. Ms. Tarte testified that she had no recollection of Ms. Moon' telling her this. Contemporaneous notes of the conversation made by Ms. Moon support Ms. Tarte's testimony. In any event, resolution of this discrepancy is not crucial to the Panel's determination.

[2]Ms. Tarte testified that it was usual procedure for Bytes & Types to deal only with clerical personnel in responding to service calls and to make repairs without first advising LAC officials.

After she had made the repair to the ground plug and performed the diagnostic test on the malfunctioning computer, Ms. Moon met with Ms. Tarte and prepared an invoice for the diagnosis in the amount of $248.60.[3] (Record, p. 43). When Ms. Moon made the invoice out to NAYCO, Ms. Tarte requested that she make it out to LAC instead. According to Ms. Tarte, she advised Ms. Moon that LAC would do what it could to get the invoice paid.

On June 28, 1988, without referencing a specific section of the Consolidated Procurement Code, LAC filed a vendor complaint with General Services against Bytes & Types alleging that the diagnosis of the computer was covered by the maintenance contract and that Bytes & Types' rate of $113 per hour was unreasonable. After an unsuccessful attempt to resolve the matter through negotiation, the CPO scheduled a hearing pursuant to S. C. Code Ann. §§ 11-35-4220, and -4230 (1976). Section 4220 provides for the debarment or suspension of a vendor from doing business with the State in the event of a serious breach of contract. Section -4230 empowers the CPO to resolve contract controversies between the State and a vendor.

In his decision dated December 12, 1988, the CPO, pursuant to his authority in §-4230, found that NAYCO had damaged the computer and that Bytes & Types was not

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[3]The repair of the ground plug was covered by the maintenance contract.

responsible under the maintenance contract for service made necessary by other vendors. The CPO further found that, while Bytes & Types should have advised LAC that the diagnostic service it was performing might not be on contract, LAC accepted the service when it advised Bytes & Types to bill it rather than NAYCO. The CPO ordered LAC to pay Bytes & Types the amount of the invoice. The CPO declined to award Bytes & Types interest or costs.

After the CPO issued his decision, LAC tendered to Bytes & Types a check for the amount of the invoice. Ms. Moon testified that she did not cash the check because it contained a release of all claims. On December 20, 1988, Bytes & Types applied to the Panel for costs in the amount of $6900.59 (Pltf.'s Ex. 4) and late charges in the amount of $22.32.

One day prior to the hearing before the Panel, LAC moved to dismiss Bytes & Types' appeal arguing that no authority exists to award costs in a §-4230 contract controversy case. LAC contends that the Panel may award costs pursuant only to §-4210(7) in the case of a bid protest. All parties concede that the maintenance contract in question does not provide for costs.

The Panel denied LAC's motion at the inception of the hearing because issues other than cost were presented for consideration. In addition, neither Bytes & Types nor General Services had received the motion which was served by mail. LAC, joined by General Services, renewed the motion

to dismiss at the close of Bytes & Types case and then presented evidence subject to its motion.

LAC argues that Ms. Moon's fifty plus hours at the rate of $113 per hour is unreasonable in light of the small amount of money in controversy ($248.60). Bytes & Types responds that the time spent was warranted because it faced debarment from doing business with the State as a result of LAC's complaint.[4] The record reveals that, although LAC did not so state in its complaint to the CPO, Bytes & Types had reason to believe that debarment was an issue in the hearing before the CPO based on the notice of hearing dated November 7, 1988. (Record, p. 25). Bytes & Types also presented evidence that $113 per hour is its standard charge for computer consultation and repair.

LAC further offered the affidavit of Nick Foster, a Word Systems technician, stating that, some time after Bytes & Types diagnosed the computer in question as having a blown system board, he reassembled the parts and the computer worked properly without the need for repair. (Def.'s Ex. 1). In response to the affidavit, Bytes & Type questioned the chain of custody of the system board and pointed to the inability of LAC, NAYCO, or Bytes & Types to get the computer to work in June 1988.

CONCLUSIONS OF LAW

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[4]Ms. Moon testified that approximately one-third of Bytes & Types' business is with the State.

Based on the evidence presented to it and the CPO, the Panel concludes that the problem with LAC's computer was caused by NAYCO and that Bytes & Types was not responsible for service under its maintenance contract with the State. The Panel further finds that, even though LAC did not originally request a diagnosis of the computer, it nevertheless accepted Bytes & Types' services in that regard when it instructed Bytes & Types to bill LAC rather than NAYCO. The Panel upholds the CPO insofar as he orders LAC to pay Bytes & Types $248.60 for the diagnosis performed by it.

Bytes & Types also asks the Panel to award it late charges of $22.32, which is 1 1/2% per month for six months. LAC and General Services argue that under S.C. Code Ann. 11-35-45 the State is not required to pay interest until it is satisfied with the services and, even then, it cannot pay more than 15% per annum (1 1/4% per month). The Panel finds that, assuming § 11-35-45 applies to this situation, LAC accepted Bytes & Types' services on June 22, 1988 when Ms. Tarte instructed Ms. Moon to make the invoice out to LAC rather than NAYCO. From that time until the date of the CPO's decision after which LAC tendered payment is approximately six months. At 15% per annum, the late charges due Bytes & Types total $18.60.

Finally, Bytes & Types requests the costs incurred by it in defending against LAC's complaint. LAC and General Services contend that the Panel does not have the authority

to award costs in a § -4230 action.[5] Section 11-35-4230 provides:

> (1) This section applies to controversies between the State and a contractor . . ., which arise by virtue of a contract between them. . . .
>
> (2) The appropriate chief procurement officer is authorized to settle and resolve a controversy described in subsection (1) of this section.

Appeal from the CPO's resolution of a contract controversy is to the Panel and is de novo. §§11-35-4230(5) and -4410(5). Section -4230 does not define or limit what remedies may be applied by the Panel.

Section 11-35-4410(1), which creates the Panel charges it to provide a review of ". . . a decision concerning the resolution of a contract or breach of contract controversy, or any other decision, policy or procedure arising from or concerning the expenditure of state funds for . . . procurement."

The General Assembly intentionally granted the Procurement Review Panel broad discretion to oversee procurement matters. Florence Crittendon Home v.

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[5] LAC and General Services also argue that §11-35-4210(7), which Bytes & Types cites in its appeal, applies only in the bid protest situation. Because the Panel holds that it has the inherent authority to award costs as part of its authority to resolve contract controversies under §-4230, it is not necessary to decide whether §4210(7) also applies in this case. Further, Bytes & Types was not represented by counsel and the Panel does not hold its request for relief to be strictly under §11-35-4210(7).

Procurement Review Panel, Order of Judge John Hamilton Smith (June 18, 1984). Such broad power is necessary to carry out the Panel's function to resolve bid protests, contract controversies, and other matters which come before it. An agency generally has such powers as are expressly conferred and such powers which are necessary by reasonable implication or are incidental to powers expressly conferred. In re: Protest of Zupan and Smith Sand & Concrete Company, Case No. 1988-3.

The awarding of costs allows vendors to come forward with perceived problems in the State's procurement system without economic penalty and, therefore, furthers the purposes and policies set forth in §11-35-20(d), (e), (g), and (h), i.e., to promote increased public confidence in public procurement, to ensure fair and equitable treatment of all who deal with State procurement, to foster competition and to provides safeguards for the maintenance of a procurement system of quality and integrity with defined rules of ethics and behavior.

The Panel finds that inherent in its mandate to review contract controversies is the power to resolve them by awarding costs, fees or such other relief as justice dictates. This power is irrespective of whether there are contract provisions which provide for such relief.

Considering the issues involved, the amount originally in controversy and the statement submitted by Bytes & Types, the Panel finds that a reasonable reimbursement amount in

this case is $512.45, which represents 10 hours of Ms. Moon's time at $50.00 per hour plus expenses in the amount of $12.45. (Record, p. 5). The Panel finds that no reimbursement is warranted for the participation of any Bytes & Types' employee other than Ms. Moon.

For the foregoing reasons, the December 12, 1988 decision of the CPO is modified as stated above and Legislative Audit Council is ordered to pay to Bytes & Types $248.60 plus $18.60 interest for services performed by it, plus $512.45 in costs within 60 days of receipt of this Order.

IT IS SO ORDERED.

SOUTH CAROLINA PROCUREMENT REVIEW PANEL

Hugh K. Leatherman, Sr.
Chairman

2-21-, 1989
Columbia, S. C.

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General Services Procurement Regulations
(Binder 23 of S. C. Code Ann. (1976))